Law Reform Commission of Canada
Commission de réforme du droit du Canada

ADMINISTRATIVE LAW

independent administrative agencies

Working Paper 25

Law Reform Commission
of Canada

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INDEPENDENT ADMINISTRATIVE AGENCIES

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Notice

This Working Paper presents the views of the Commission at this time. It reflects the state of Canadian federal administrative law and governmental organization and practices as of the end of May, 1979. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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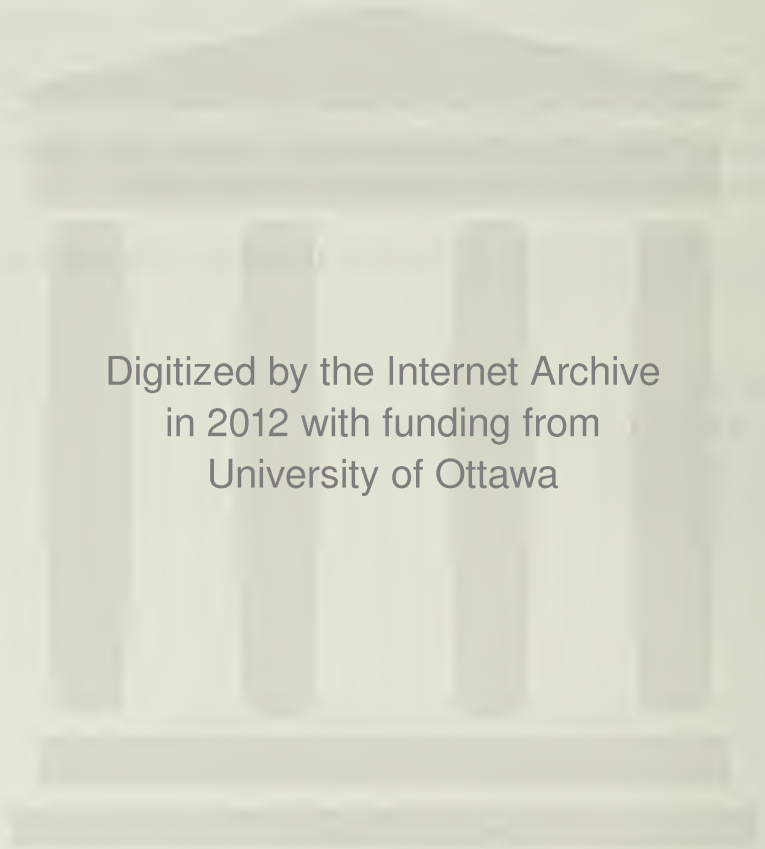

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Table of Contents

Foreword

The expansion of state activity into virtually every aspect of social life has posed problems for established legal systems. They are constantly trying to come to grips with that interface between law and modern government administration which has become known as administrative law. In fact, no generally accepted approach to the subject of administrative law has been developed, at least in countries whose public law falls within the common law tradition.

The law and lawyers in Canada still tend to look at administrative law largely in terms of the remedies available before the courts to respond to abuses in the administrative process. We are only three generations removed from the great British constitutional authority, A. V. Dicey, who could assert that "The words 'administrative law' . . . are unknown to English judges and counsel, and are in themselves hardly intelligible without further explanation".[1] Today, it is clear that judicial review of administrative action constitutes only one segment, albeit an important one, of administrative law. Small wonder, then, that at the time of the establishment of the Law Reform Commission in 1970, the Minister of Justice declared that administrative law should, along with criminal law, be one of its priority items of study.

Despite this, the work of the Commission in administrative law had modest beginnings. Specific topics designated for examination were closely linked to other aspects of its work. Thus, the Commission's first research program announced that the law of evidence before administrative tribunals and the effectiveness of sanctions invoked to enforce federal statutes would be studied. And at the suggestion of the Minister of Justice, the Commission also undertook a study of expropria-

tion law. Nevertheless, the research program made the Commission's long-range interest in the area clear by announcing that it would also study "the broader problems associated with procedures before administrative tribunals".

Much of the work on the first set of topics has now been completed. A Working Paper and Report to Parliament on *Expropriation* have been issued,[2] and evidence before administrative tribunals has been dealt with, in part at least, in the Report on *Evidence*.[3] Working Papers on *Commissions of Inquiry*[4] and *Federal Court: Judicial Review*[5] have been published, and Reports on these subjects are currently in preparation. A Working Paper on the effectiveness of sanctions is also being prepared.

The term "administrative tribunals" was being employed in its broadest sense when the Commission's research program was adopted in 1971. This was in keeping with the definition of tribunal set forth in section 2 of the *Federal Court Act*:

> "federal board, commission or other tribunal" means any body, or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *British North America Act*, 1867.[6]

Under this definition, not only a federal administrative authority specifically called a tribunal, but also any departmental official, agency, board or commission, or even a minister or the entire Cabinet, can be characterized as a federal administrative tribunal to the extent that the person or body exercises jurisdiction or powers conferred by statute; nothing hinges on the formal name of the entity.

A study of the "broader problems associated with procedures before administrative tribunals" thus encompasses the whole of the federal administrative process insofar as it involves public officials who exercise powers pursuant to statute. It involves, in respect of a vast number of extremely varied administrative authorities, consideration of such diverse matters as the relation of these authorities to the Cabinet, to

Parliament, to the courts and to the public, as well as many specific procedural problems arising before them. The necessity for some limitations to the scope of research became evident, if we were to deal in any effective manner with the wide range of issues involved within a reasonable period of time.

Even more daunting than the scope of the subject was the lack of information in the area. Too little is known about the workings of administrative tribunals, since most Canadian writing on administrative law has tended to stress judicial review. While the relation of the courts to administrative tribunals remains an important issue, it must be recognized that there are often factors other than the prospect of judicial review which have equal or greater impact on administrative decisions. As a first priority, therefore, it was necessary to take steps to remedy the lack of information.

An early step was the decision to sponsor research that led to the publication of *A Catalogue of Discretionary Powers in the Revised Statutes of Canada*, 1970.[7] The *Catalogue* identified and classified most of the discretionary powers (no fewer than 14,885) explicitly conferred upon public authorities by federal statutes. The Commission attempted to identify discretionary powers because of their enormous importance compared to the less numerous mandatory and ministerial statutory powers exercised by public authorities in the day-to-day administration of government affairs. Of course, the *Catalogue* provided information only about powers which might be exercised. To learn anything about the powers actually exercised, their effect on government administration and their impact on private rights and interests, meant studying the actual practices and procedures of those who wield the powers.

It was decided, therefore, to study the practices and procedures of a number of tribunals. The objectives were and are to gain an appreciation of what these bodies were designed to do and how they function, to learn what powers they exercise and with what result. Only in this way, it was thought, could one identify the broad problems associated with procedures

before administrative tribunals (*i.e.*, with the manner in which tribunals exercise their powers). The studies would provide a basis for proposing reforms to remedy these problems.

At the outset there was the problem of deciding which tribunals to study. We eventually determined to apply three criteria in preparing a list of tribunals to receive our initial attention. First, tribunals formally established with some degree of independence were selected. It was easier to review their work comprehensively than to delve into departmental processes and chains of command in order to determine the extent of responsibility of an authority attached to a department of the government. Second, in order to give priority to a series of studies on tribunals whose activities and decision-making directly affect private rights, tribunals having exclusively advisory functions but with no power to make recommendations or final decisions directly affecting rights, were put aside for possible later examination. Third, an attempt was made to select tribunals carrying out a variety of tasks and using different procedures in order to provide a basis for comparison between the exercise of different types of powers and related practices. It was believed that an approach of this scope would afford the Law Reform Commission an opportunity to determine the major problems involved in tribunal administration.

Because the bulk of our work has been concentrated on those administrative authorities sometimes called "independent administrative agencies", this Working Paper is largely confined to administrative law problems relating to these bodies. However, as will become evident, some of the discussion has broader implications.

The independent agencies initially selected for study were the following: the Immigration Appeal Board,[8] the Atomic Energy Control Board,[9] the National Parole Board,[10] the Unemployment Insurance Commission,[11] the Canadian Transport Commission,[12] the National Energy Board,[13] the Canadian Radio-television and Telecommunications Commission,[14] the Pension Appeals Board,[15] and the Anti-dumping Tribunal.[16] The Commission later arranged to study the Canada Labour Relations Board[17] and the Tariff Board[18] as well.

In preparing the specific agency studies, researchers spent a considerable amount of time observing what agencies do and talking with those who make or are involved in making decisions for them, as well as with those who are affected by their decisions. Attempts were made to describe their organizational make-up, how their members perceive their roles, and how the agencies relate both to private interests they deal with and to the government. A research paper prepared for the Commission entitled *Approaches to the Study of Federal Administrative and Regulatory Agencies, Boards, Commissions and Tribunals* was published in "Canadian Public Administration".[19] It outlined a multi-disciplinary approach for agency studies, and suggested that such studies go beyond what were considered to be traditional legal issues in the narrow sense.

Other study papers attempt to deal with general problems facing independent agencies. Papers on *Access to Information*,[20] *Public Participation in Administrative Proceedings*,[21] *Political Controls over Independent Agencies*,[22] *Parliament and Administrative Agencies*,[23] and *Supervision with Independence in the Administrative Process*[24] have already been completed.

Naturally, the question of judicial review could not be ignored. Consequently, both a Study Paper on the *Federal Court Act*[25] and a Working Paper entitled *Federal Court: Judicial Review*[26] were prepared. A Report on the same subject will be forthcoming. That work provides the basis for the comments on judicial review made in Chapter Seven of this Working Paper.

Here we propose to step back from the perspective of any specific agency and to discuss more generally the operations of federal independent agencies in Canada. Many of the issues in administrative law which have surfaced in the provinces and in other countries, as well as academic literature, are discussed in the light of the knowledge we have gained from our studies of particular independent agencies. In the discussion of the broader problems associated with administrative authorities, some of the values which the Commission believes should govern their solution have become evident, and on the

basis of these values, directions for reform are set forth. On some of the issues we have developed fairly firm positions; on others only tentative suggestions can be offered. The Commission does not intend this Paper to be its last work on administrative law; reform in this area is an ongoing task and one of the principal purposes of the Paper is to indicate future directions for the Commission's research.

In preparing the General Working Paper, the Commission has benefited from the comments made by specialists in various disciplines. We thank in particular those persons who accepted the invitation to be members of the Consultative Committee who commented on various draft versions of the Paper. Among those participating were: persons with experience as members of independent agencies, including Marshall Crowe, Yves Dubé, Gordon Fairweather, Jacob Finkelman, Pierre Juneau, William Outerbridge, Marguerite Ritchie, and Jack Stabback; agency counsel, including Chris Johnston, Russell Juriansz and Fred Lamar; and the Commission's Senior Advisor from among administrative law practitioners, Brian Crane. Alan Reid assisted in the preparation of early drafts of the Paper, and Charles Marvin in later ones. Others who contributed to the final product were Pierre Issalys, Alan Leadbeater, Sandra McCallum, and Gaylord Watkins. The Commission depended, of course, throughout the Paper on information and insights provided by the authors of the other papers already prepared under the auspices of the Administrative Law Project.

INTRODUCTION

Independent Administrative Agencies — Issues and Values

This Working Paper deals with some of the major issues associated with proceedings conducted by federal independent administrative agencies. It comes at a time when there is growing tension surrounding the increased governmental regulation of social and economic life. In contemporary society few activities are not in one way or another affected by state organizations. Governmental bodies charged with traditional government concerns — municipalities, the police, schools, the public service, the courts — have all seen marked expansion. The increasing scope and degree of government involvement in societal affairs has also resulted in the proliferation of all sorts of new governmental agencies — boards, commissions and tribunals — many of which operate outside of traditional departmental structures. One needs only to think of activities such as the marketing of commodities, the conduct of labour-management relations, the regulation of transportation services, and the management of social benefits schemes, to see the importance of these agencies in our everyday lives.

Most people would probably agree that some degree of government control and regulation is essential in modern society, and it will likely continue as an important part of our

social organization for the foreseeable future. But most of us tend to be ambivalent about it. In one situation or another we are likely to see government commitment to social benefits programs or regulatory devices either as an expanding encroachment on the freedom of the individual or as an undue interference with private enterprise or with the rules of the market place. But even where there is agreement as to the desirability of government initiatives, either in general or in a particular context, it by no means follows that there will be approval of the mechanisms or procedures used or the means of carrying them out.

Indeed, we confine ourselves here to the discussion of one type of mechanism, administrative tribunals, as defined in the broad sense in the *Federal Court Act*.[27] More particularly, this Paper is based on a series of studies on that small group of independent agencies currently in place which apply and develop government policies, and the manner in which they operate from an administrative law perspective. We do not intend to speculate about any mechanisms other than administrative tribunals, or administrative authorities as we prefer to call them,[28] which the government might use to carry out particular initiatives. Nor do we wish to involve ourselves in a guessing game as to what sectors of human activity the government should or should not involve itself in. We leave that to adherents of disciplines purporting to specialize in such matters. Even the traditionalists among administrative lawyers would be prepared to admit that, aside from situations where administrative tribunals are established principally to adjudicate matters, governmental concern does not need to result in the creation or maintenance of institutional mechanisms of any particular form. For example, tax incentives, subsidy programs, grants or loans, or even deregulation or discontinuance of any governmental involvement in a given area, might prove to be viable and even desirable alternatives to social benefit schemes or regulatory agency mechanisms.

The decision to concentrate on the independent agencies arises from a number of considerations. Their very importance and pervasiveness is one. The fact that they seem to spring up everywhere without any overriding design or clear relation to

other governmental institutions is another. From the particular perspective of the Law Reform Commission, the characterization made of, and significance attributed to proceedings before these agencies by authorities from each of the traditional branches of government, as well as by persons involved in the agency proceedings, form yet a third consideration.

There is also the fact that we sense that an increasing tension is building up around these agencies. Part of the tension is reflected in the allegation that Ministerial control over government operations, and Ministerial responsibility to Parliament for those operations, is weakened through the delegation of power to make regulations and social policy to non-elected government officials assigned to run independent statutory bodies. This is not merely a doctrinal issue of interest to politicians and constitutional experts. Observers of government and public administration have noted the occasional feeling of unease in the interaction between career civil servants acting as ministerial policy advisors within departments, on the one hand, and politically appointed members of independent agencies and their staffs, on the other hand. Academics and journalists have cited chapter and verse of cases where a need apparently exists to improve the rapport between departments and independent agencies having related policy interests.

A second concern is the question whether it is appropriate for those who make rules to be permitted also to sit in judgment in the application of those rules to individual cases. The traditional commitment to the splitting of institutional responsibility for making law and applying law between distinct legislative and adjudicative bodies is breached when reliance is placed on one agency to combine both functions. But, this commitment is no less breached, of course, when the Minister is placed in a position both to approve regulations and then serve in an appellate function to review an agency's decisions based on the regulations.

Another factor serving to maintain tension concerning the administration of government stems from the differences in points of view which various persons have of the goals of

agencies, how they function, the limits of their power and how they relate to other institutions of government. Individuals who have to deal with a social service agency may perceive its operation to be overly complicated and difficult; there is uncertainty about how it operates, how policy is made and who influences it. Persons appearing before agencies which make decisions affecting freedom of movement, property rights or trade interests are naturally as concerned about procedural safeguards as they are about the consistent application of government policy.

Various persons directly affected by an agency regulating a specific industrial sector may, of course, see things differently. Some will perceive its activities as an encroachment by government on their freedom of choice or flexibility of operations. At the same time, many regulated industries welcome the stability and support which regulation provides and accept the inevitability of government standards, especially where public health and safety are at stake. Even so, agency processes are sometimes regarded as slow and cumbersome, and run by people who do not have a sufficient appreciation of the problems of those who are subject to its rulings. For example, industrial and commercial interests occasionally complain of a policy vacuum in a regulatory agency making it virtually impossible for them to engage in adequate planning. It deprives them of lead time in organizing their operations and this in turn fuels demands for government deregulation.

To the government of the day, even the agencies with clear and specific statutory mandates may at times seem highly unresponsive. Far from being tools of the government, some agencies may be perceived as obstacles to the achievement of government policies. The government of the day may sense the prospect of an eventual confrontation between itself and an agency, especially one having a broad policy mandate and staffed largely by unsympathetic appointees. It may seek ways of exercising more direct control over the functions presently exercised by administrative agencies — for example, by transferring responsibilities into departments more closely aligned with it.

For many lawyers and judges, the point of focus is the fact that the agencies are engaged in making decisions which directly affect individual and property rights. They look at the agencies as potentially arbitrary and in need of careful scrutiny to prevent excesses and abuses. For many, the integrity of agency processes is conditional on an agency functioning more or less like a court. Concomitantly, they tend to stress the importance of judicial review of administrative decisions. This is often diametrically opposed to the views of administrators who strive for efficiency. Moreover, the judicial model does not fit well in the case of agency operations more concerned with planning and policy making than with adjudication and the application of the letter of the law. Consequently, the stress on judicial procedures and review may de-emphasize the need for more broadly based internal reform of procedures, for broader representation of relevant interests, and for a more defined system of accountability to Parliament and the government.

Those who administer the agencies often tend to stress the importance of adopting efficient means of fulfilling statutory mandates. Most are concerned with implementation, costs and efficiency, and some may be willing to compromise what others would regard as basic rights. There are differing perceptions among administrators about how decisions ought to be made. An administrator's concept of the "public interest" may be narrowed by a restricted view of his role, influenced significantly by the interests most frequently and strenuously advanced before him. Administrators are influenced by their own perceptions of what government policy is, regardless of whether such policy is clear or even exists, or of the accuracy of their perceptions with respect to policy. Some may interpret their statutory mandates narrowly. Others may perceive that Parliament has conferred on them a greater degree of independence than is actually the case.

Finally, the appropriate place for independent agencies in the constitutional framework, both under political theory and in their practical relationship to Parliament, remains unresolved. To the extent that there is no Minister actually responsible and accountable before Parliament for the operations

of a government agency, one can say that there has been an investiture of power in the agency by the legislature, rather than a mere delegation of authority. It is at least partially in response to the reality of this situation that the general public has demanded that a degree of participatory democracy be introduced into agency proceedings. Where their elected representatives do not govern, interested members of the public themselves seek to become involved.

Parliament, of course, currently exercises a degree of scrutiny over agency operations in various ways, for example, in the handling of accounts, and through the examination of statutory instruments by the Standing Joint Committee on Regulations and Other Statutory Instruments. Nevertheless, there is rising sentiment in favour of increasing Parliamentary scrutiny over both expenditures and the substance of operations of various governmental bodies, including the independent agencies.

It is obvious, therefore, that different perceptions give rise to differing and sometimes competing concerns. The fact that agencies are indiscriminately described as tribunals, boards, commissions, and agencies, and are invested with a wide variety of powers and duties, does little to rationalize these differing perceptions. Moreover, the practices, procedures and control mechanisms of independent agencies cannot respect, in equal degree, all the values which are seen as important by different groups and individuals. However, many individuals and organizations are favourably disposed towards the work done by administrative agencies, and the generalized concerns we have expressed should not be taken as indicative of widespread dissatisfaction. Nevertheless, the tension spoken of does exist and does contribute to many of the difficulties to be discussed in this paper.

The Commission shares many of the concerns already mentioned. We are concerned, for example, about the degree of delegation of discretionary authority and the controls to be placed over the authority, and also about the need to ensure that agency authority as exercised involves careful consideration of the interests affected by each decision. We are

interested in exploring the policy-making role of independent administrative agencies and the interplay between them, departments and the government of the day. We are concerned about the procedures agencies use in reaching decisions and the impact of those procedures on their ability to make decisions which are informed and fair. At the same time, we are mindful of the dangers of arbitrarily imposed legal structures causing institutional dysfunctions, and of too stringent procedural safeguards bringing decision-making to a grinding halt. We are concerned that agencies act with dispatch in a reasonably efficient manner. Finally, we are interested generally in the problems involved in placing the administrative process within a comprehensible legal framework, and in assessing the use of governmental and judicial controls to keep the power exercised by administrative agencies within reasonable limits. Agencies must be accountable to Parliament, the government, the courts and the public.

This cataloguing of some of our principal concerns tends to reveal the values to which we think administrative structures and procedures should conform, but we think it will lead to clarity to set forth these values or principles explicitly:

(1) *Accountability* — Accountability to Parliament and government for the exercise of governmental authority; accountability to the courts for excess or abuse of power; responsiveness to the public, in the sense of making decisions based on the inclusive representation of relevant interests and an appropriate consideration and weighing of those interests.

(2) *Effectiveness, economy and efficiency* — The activities carried on by administrative authorities should achieve their goals or intended effects. Operations should be organized economically with an appropriate mix of human and material resources. They should be run efficiently with a maximum production of administrative services in relation to resources employed.[29]

(3) *Fairness* — If an administrative authority does not operate fairly pursuant to proper procedures, it becomes incapable of performing its functions and attaining its

objectives in a society which depends as much as ours on the voluntary cooperation of citizens. This value should be reflected in internal agency processes, and supported by the traditional supervisory role of the courts. Fairness can produce by-products such as trust and credibility which, in turn, increase social cohesiveness, belief in the legitimacy of governmental institutions, and cooperation with them.

(4) *Integrity* — The integrity of administrative processes must be respected. If an enabling Act grants a power to an agency, it should really exercise the power; the government of the day should not be pulling hidden strings. The morale of decision-makers must not be sapped by manipulating them. Those charged by law with making decisions in accordance with certain norms and procedures must make those decisions without unduly bowing to external pressures or improperly using information not on the record.

(5) *Authoritativeness* — Citizens have a right to authoritative decision-making from governmental bodies designated as having particular powers. Subject to specific appeal or other review procedures, agency decisions should have the quality of *finality*.

(6) *Principled decision-making* — Administrative authorities should base their rules and individual decisions on principles which are identified and articulated. To the extent that it is possible for any field of activity under consideration, authorities should take into account appropriate facts and arguments in order to achieve *correctness* and *accuracy* in decision-making.

(7) *Comprehensibility* — Government institutions and procedures should be so structured and inter-related as to make them as understandable as possible; mechanisms should also be developed to make them known and understood. Interested persons must know to whom to present their cases and in what manner.

(8) *Openness* — This includes *accessibility* to government institutions. This value also supports all the other values:

an open process is more comprehensible and more accountable than a closed one; it supports its integrity; it encourages fairness; it is likely to promote effectiveness by producing more accurate decisions; it should conduce to more preformulated standards and thereby certainty.

The importance of the eight values mentioned lies in their providing some standards against which to measure administrative practices and procedures. They occasionally conflict with one another in given situations depending on priorities involved and interests at stake. However, this should not be overemphasized.

Generally, our purpose in this Paper will be to examine the functioning of the independent agencies and their relationships to other government institutions in light of these values so as to identify relevant major problems, to make such recommendations as seem possible on the basis of our present knowledge, and to identify areas for future research. To summarize, therefore, this Working Paper attempts the following:

(1) to identify some of the broader problems associated with procedures before administrative tribunals;

(2) to set forth the values at issue in the resolution of these problems;

(3) to make recommendations and suggestions for the reform of the law and its administration so as to deal effectively with these problems; and,

(4) to define areas requiring additional research in order to identify other problems and the further steps which must be taken for their resolution.

CHAPTER ONE

The Historical Perspective

The emergence of a complex federal administrative structure in Canada, including independent agencies which refine and apply the law under the aegis of special statutory powers, is not the product of a well-defined approach or design. The growth of this structure is best described as an aspect of the evolution of government rather than as a planned constitutional development. It takes its shape from pragmatic responses to emerging problems over the years. In some situations, especially in the early years, the choice of certain types of governmental bodies to perform particular functions may have been the product of a reasoned general approach. But the choice in many cases seems to have been *ad hoc*. The selection of a non-departmental rather than a departmental body to regulate, or an administrative tribunal rather than the courts to adjudicate, appears to have been influenced, more often than not, by the exigencies of the case and existing institutional precedents than by an overall plan or any particular attitudes respecting one type of governmental body rather than another.

Being a product of history, the present composition of the federal administrative structure cannot be fully understood without some knowledge of its growth. A detailed history of

that growth has yet to be written. But to explain the present place of independent administrative agencies in the modern state apparatus at the federal level in Canada, this first chapter delineates the legal context within which the Canadian government has traditionally operated, and gives a thumbnail chronological sketch of the parallel growth of government activities and independent agencies.[30]

A. The Traditional Legal Context

Government in a general sense includes two functions — law-making and administration. Under our system, Parliament makes the laws which are carried forward by the executive and the public service. Both functions, legislative and executive, are actively directed by the governing party through the Cabinet. Ours is a system of responsible government which is based on the concept that the government collectively, and Ministers of the Crown individually, must account to Parliament for governmental action under their control.

The courts function independently as arbiters of the law in accordance with fundamental constitutional relationships which have evolved over the centuries and were inherited from Great Britain. Some of these constitutional relationships are reflected in the *British North America Act*, 1867[31]; others — such as the independence of the courts — are firmly established by custom or tradition. Fundamental too is the "rule of law", that society shall be governed through principled decision-making rather than by the arbitrary fiat of an individual or group. While Parliament, in its role as legislator within the limits of federal jurisdiction, is supreme in the sense that it can easily repeal or amend any ordinary law, in practice it normally feels compelled to respect the basic laws or constitutional conventions about such matters as the relationships between the legislature, the executive and the courts. These well-accepted propositions (which, while trite, can stand repetition from time to time) take us towards a less well

defined area between law and politics — the field of public administration.

Although historically the conduct of public business was the prerogative of the King and His Council and as such largely beyond judicial control, it can now be said that Ministers and public servants must act in compliance with the general laws of the land. A system of public departments established by statute was introduced in the United Canadas in 1841, and this model was adopted by the federal government in 1867. Only the Privy Council remained a prerogative department as opposed to a statutory authority. There are still some privileges and immunities favouring the government in litigation, but they are becoming less and less important, and in the 1975 Report on *Evidence* this Commission recommended that those privileges and immunities be further restricted.[32]

The involvement of government, and its employees, with the judicial process takes many forms: a citizen may be injured by the negligence of a public servant, a government contract may be broken, the government as tax collector may sue for customs duties or income tax, or lands may be expropriated by a public authority. Again, a constitutional or jurisdictional problem may have to be decided: a question of federal or provincial competence under the *British North America Act*,[33] the invalid exercise of power by a minister or civil servant, or a failure to comply with statutory standards such as those set out in the *Canadian Bill of Rights*,[34] the *Canadian Human Rights Act*[35] or the *Official Languages Act*.[36] Many of these claims come before the courts for resolution.

Having said this, it must be conceded that there is a considerable field of activity which in the normal course is not subject to judicial review: for example, the internal management of government departments and agencies, how they deal with the public and how they exercise their discretion within the limits of statutory authority. Doctrines such as Parliamentary supremacy and Crown privilege have served to inhibit the courts from intervening in such matters. These doctrines are based on the premise that law-making is the sole responsibility

of elected representatives and that government must have the authority and independence to see that the law is brought into force and administered.

While the constitutional arrangement outlined above was adequate for a small nation with limited governmental activity, new considerations have emerged in the context of the modern welfare state. Today, it is impossible for elected representatives effectively to supervise all aspects of the public business. Substantial areas of government are managed by officials who are only remotely responsible to Ministers or to Parliament and who have little direct contact with the public. Industries are controlled and regulated, taxes are levied, welfare grants are dispensed, and land is expropriated by bureaucracies which are never required to stand for election. This expansion of government has conferred on government appointees and public servants great legislative, administrative and sometimes judicial power. The courts have attempted to adapt the principles of administrative law, first developed through judicial review of lower tribunals at a time when Justices of the Peace were still the main administrators in the English countryside, to contemporary conditions where comprehensive standards are needed to limit or structure the powers of public officials who enjoy wide authority under delegated legislation. Given the scope of current governmental operations and the degree of discretionary power exercised by administrative authorities, it is clear that sources of law additional to judicial ones will have to be depended upon if administrative law is to be bolstered to meet existing needs and to ensure that governmental action is carried out fairly, effectively and responsibly.

B. The Expansion of Government

At Confederation and for quite a few years thereafter, the federal government and its administrators were preoccupied

with the extension and protection of the frontier and the development of a national economy. Thus the opening of the West, relations with native peoples, building the great transcontinental railways, and the protection of the border were the great public questions. There was a handful of government offices in Ottawa as well as a number of officials scattered throughout the country to collect customs duties, administer land grants, carry out surveys, look after post and telegraphs and preserve order in the emerging nation.

The need for novel administrative structures reflecting the character of government functions in a young and developing country first became apparent in Canada in connection with the nascent railway industry. Even before Confederation the Province of Canada had resorted to a type of non-departmental regulatory body when it enacted a *Railway Act* in 1851 under which regulatory functions, principally the approval of rates, were assigned to a Board of Railway Commissioners, although in fact the functions were assumed by four Cabinet Ministers. This device, known after Confederation as the Railway Committee of the Privy Council, persisted until 1903.[37]

However, a debate over whether Cabinet Ministers should be replaced by full-time semi-independent officials began as early as the 1880's. The idea of establishing a railway regulatory commission to take over the function of rate-making from the Cabinet committee was considered but rejected in the Galt Royal Commission Report of 1888.[38] That Commission was reluctant to recommend the model of the recently established United States Interstate Commerce Commission,[39] which it regarded as untried, and ventured the view that a commission format was inconsistent with the Canadian system of responsible government, ignoring the fact that the British Parliament was also then experimenting with a commission model.[40] But the problems associated with the employment of Cabinet Ministers as regulators did not go unnoticed by the Galt Commission. The fact that Railway Committee members served only part-time and were based in Ottawa, their lack of expertise and their vulnerability to political pressure were sensed as limitations on their effectiveness.

It is hardly surprising that the Galt Commission should have opted for keeping railway regulation within the confines of a government department. The system of public departments was well established when the Commission reported. Railways had been included in the responsibilities of the Department of Public Works after Confederation, and in 1879 had been placed under a newly constituted Department of Railways and Canals. Furthermore, the increased workload and complexity of the tasks entrusted to the Cabinet Committee seemed to call for the full-time employment of knowledgeable people. The necessary expertise might conceivably have been built up within the department. However, there were certain drawbacks to this course.

Generally, there was less inclination at that time to involve the federal public service in complex programs. To a large extent the public service performed ministerial functions and gave support to more direct public service programs offered in the provinces. More specifically, the tradition of patronage in the public service of the day gave rise to fears that designated departmental personnel might have inappropriate backgrounds or lack the technical capacity to deal with the kinds of issues being raised in the context of railway regulation. Also, adjudicative functions were largely foreign to departments, and the considerations which supported the removal of these duties from the Cabinet Committee probably precluded as well their being vested in a department. In retrospect, it is interesting to speculate on the question whether the present *pot-pourri* of independent agencies would exist today if a professional and non-partisan Canadian federal public service had been available at the turn of the century to take up the slack from Cabinet ministers.

The move towards a non-elected full-time body outside any departmental structure to regulate railways matured with the reports of Professor S. J. McLean to the Minister of Railways and Canals on *Railway Commissions, Railway Rate Grievances and Regulative Legislation* between 1899 and 1902.[41] These reports suggested the appointment of an independent commission to take the place of the Railway Committee and drew the following conclusions:

1. There must be great care in the definition of the powers conferred upon the commission.

2. The matters to be dealt with are concerned with administration and policy, rather than formal judicial procedure.

3. Subject to an appeal to the Governor in Council the decision of the commission should be final.

4. There should be requirements in regard to technical qualifications for office; one commissioner should be skilled in law, and one in railway business.

5. The commissioners should hold office on the same tenure as judges.

The *Railway Act* of 1903,[42] which reflected in large part the recommendations of the McLean Reports, opted for a new administrative agency, the Board of Railway Commissioners, which appears to have served as a model for later legislative initiatives vesting all kinds of governmental functions in independent agencies. It is noteworthy, however, that the Act provided for an important measure of judicial and political control. There was an appeal to the courts on questions of law or jurisdiction, and the Governor in Council was authorized, either on petition or of its own motion, to vary or rescind any order, decision or rule of the Board. Thorny issues about the appropriate institutional relationships to establish between Cabinet, independent agencies, and individual ministers in charge of related departments still remain to be adequately dealt with today.

Within six years Canada again used a regulatory commission model to establish by treaty, jointly with the United States, the International Joint Commission[43] to replace the International Waterways Commission,[44] which had been a purely investigatory body. It marked a further important step in establishing a framework for government regulation in Canada similar in many respects to the type concurrently being set up in the United States. The practice of appointing

experts to decide rather than merely to advise was becoming firmly established. There was much faith displayed at the time in the recruitment by government of specialists, especially those with backgrounds in business affairs, to bring their knowledge to bear on certain economic and political issues. The approach was again followed in 1912, when the *Canada Grain Act*[45] established a Board of Grain Commissioners charged with the administration of terminal warehouses and generally all matters related to the inspection, weighing, trading and storage of grain.

This was a period during our history when marked changes were taking place in the economy and in society at large. By 1900 the major economic and political problems which had precipitated Confederation had been resolved — the frontiers had been established and guaranteed, transportation and communication links had been forged and our national political and legal institutions had been established. During the first part of this century there was intense economic development, stimulated by waves of immigration, integration with the American economy, the assumption of responsibility in international affairs and the forced expansion of World War I. Immigration, which had been a mere 49,000 in 1901, rose to a phenomenal 402,000 in 1913. At the same time people were moving to the cities, especially Montreal, Toronto, Vancouver and Winnipeg.

C. World War I — Growth of Government Controls

With the advent of World War I and the commitment of Canada to the war effort, there was marked intervention in the economy by the federal government, including rent and price control, the prevention of hoarding, and the control of the marketing of Canada's principal products. This led to the creation of many administrative agencies such as the Board of Grain Supervisors (succeeded in 1919 by the Canadian Wheat

Board), the Food Control Board (later the Canada Food Board), the Wage Trade Board, and municipal Fair Price Committees.

The government also took major initiatives in the health and welfare fields for the first time, although certain measures tangential to Agriculture, Immigration and Indian Affairs operations had been previously adopted. A Board of Pension Commissioners was established in 1916, to be replaced by the existing Canadian Pension Commission in 1933. The Department of Soldiers Civil Re-establishment was created in 1918, and the Department of Health in 1919. They were consolidated in 1928, only to be split again into Veterans Affairs and National Health and Welfare in 1944.

To finance the expansion of the public sector, direct taxation was introduced, first under the rubric of an excess business profits tax in 1916, and then in the much more significant form of an income tax on individuals and corporations in 1917. The income tax has greatly increased since then, and has provided guaranteed means for bureaucratic growth.

It was also during the War, fifteen years after the installation of the first major regulatory agency, that the Union Government under Robert Borden placed the federal civil service on a truly professional footing by the *Civil Service Act*, 1918.[46] The Civil Service Commission, which had been given statutory powers over personnel in 1908, saw these powers expanded under the new legislation. At this point, the Commission assumed responsibility to pass upon the qualifications of candidates for admission to and classification, transfer and promotion in, the civil service. For the first time, it was explicitly provided that, save in exceptional cases provided for under the statute, neither the Governor in Council nor any minister, officer of the Crown, board or commission would have the power to appoint or promote anyone to a position in the civil service. It should be noted, however, that most independent agencies created in the years after the War were exempted from the provisions of the Act.

A final significant step taken by the Union Government was the passage of the *Public Service Rearrangement and*

Transfer of Duties Act in 1918.[47] As expanded in 1925,[48] the Act provides that the Governor in Council may transfer any powers, duties or functions or the control or supervision of any part of the public service from one Minister to any other Minister, or from one department or portion of the public service to another. The Governor in Council may also amalgamate any two or more departments under one Minister of the Crown and under one deputy minister. Although a final section of the Act provided that all orders made under the authority of the Act must be tabled in the House of Commons, since the *Regulations Act*[49] was passed in 1950 no such orders are required to be tabled in the House. In recent years the executive has carried out numerous administrative reorganizations with minimal consultation. However, the practice has remained that any new departments or agencies have to be established by statute and, at least as a matter of courtesy, major reorganizations of existing departments and agencies have been ratified through legislation.

D. The Inter-War Period

At the end of the War the unusual economic controls were discontinued, with some temporary exceptions. Because of continuing high prices, many of the powers the government had exercised during war-time were conferred on a Board of Commerce, and the *Combines and Fair Prices Act*[50] gave the Board extensive powers to conduct investigations and to make determinations of fair prices and profits. But its activity was short-lived, and price-fixing had come to an end before the empowering statute was declared unconstitutional in 1922, although prohibitions against combines were revived in another form. As well, several schemes were developed to assist men who had served in the war in readjusting to life as civilians in a peacetime economy which gave birth to such structures as the Soldier Settlement Board and the Dominion Employment Services.

Nevertheless, the period following the War until the depression of the "30's" was one in which the federal govern-

ment generally refrained from extensive new activities. A contributing factor to this quiescence was that the government was burdened with war debts and the obligations resulting from its absorption of the railways which became the Canadian National Railways (CNR). This latter step was to serve as a model for other public sector enterprises to become at least partially integrated with Canadian governmental structures. By 1939, fifteen Crown-owned companies had been created to operate in the fields of rail, ship and air transportation, banking and credit, harbour administration and commodity marketing.

The rapid dismantling of war-time controls should not obscure their long-term effects. Professional civil servants had acquired expertise in performing complex tasks which far outstripped the involvement of their predecessors who, only a few years before, had been primarily involved in merely ministerial functions. The stage was set for departments to assume, in the long run, functions which up to that time might have been assigned only to specialist boards or commissions. As the Rowell-Sirois Report put it:

> People saw how governments could mould their lives and civil servants learned how to do it . . . The belief grew that governments could and should use their powers to improve social conditions. The war-time experience with the regulation and direction of enterprise was an important factor in bringing on the wide extension of government control which economic and social chaos seemed to make desirable.[51]

Economic and social pressures, this time in the form of the Great Depression, comprised the motivating factor behind renewed federal legislative efforts in the "30's". The flurry of Canadian "New Deal" legislation in 1935 saw the creation of a number of regulatory and adjudicatory agencies, but several of these became entangled in constitutional difficulties. One such casualty was federal legislation to provide unemployment insurance, but the federal government later re-enacted legislation in this field, following a constitutional amendment in 1940, to create a commission with tripartite labour, business and government representation to oversee the functioning of a special Unemployment Insurance Account contributed to by employers and employees. Other casualties included several measures governing labour relations. Constitutional difficulties

also frustrated several joint federal-provincial attempts to regulate marketing. Ultimately, various techniques, such as administrative delegation, were devised to overcome these difficulties, but these had certainly not been extensively developed when World War II again pushed constitutional distinctions into the background.

By no means were all the Crown entities created at this time unconstitutional, however. For example, the Canadian Broadcasting Corporation (CBC), created in 1932, regulated private radio and television broadcasting along with carrying on its own activities in the field until 1958. At that time an independent government agency, the Board of Broadcast Governors, later to give way in turn to the Canadian Radio-Television Commission, was created to regulate the broadcasting industry. Administrative reforms also continued in areas of activity where the federal government had been active previously. In 1931, the Tariff Board was created as an independent agency to carry out advisory and quasi-judicial functions: first, it was to conduct inquiries into matters relating to tariffs and trade; second, it was to assume appellate functions previously handled by a departmental committee under the Minister of Finance which had been called the Board of Customs. In 1935, the Canadian Wheat Board was given the responsibility for marketing wheat in interprovincial and export trade. In 1936 the National Harbours Board was created, and the Departments of Railway and Canals and the Marine were merged with the Civil Aviation Branch of the Department of National Defence in a new Department of Transport. Trans-Canada Airlines, the precursor of Air Canada, was created in 1938. Also in 1938, the Board of Railway Commissioners, which had survived the vicissitudes of time and political criticism, was reconstituted as the Board of Transport Commissioners.

E. World War II and Its Aftermath

World War II again saw the federal government adopting close and detailed control over the economy. In many cases

the chosen instrument of control was a Crown Corporation which itself "went into business" — for example, Eldorado Mining and Refining, the Polymer Corporation, the Industrial Development Bank, and Defence Construction Ltd., to name a few. The technique of control through public ownership rather than regulation was, of course, not new, and has continued to be used. One has only to mention the CNR, the CBC and Air Canada to appreciate the importance of this type of entity. The distinction between government economic controls through the activities of Crown corporations, as opposed to controls through the use of regulatory mechanisms, is not always so clear-cut as these instances would seem to suggest, however. Thus such hybrid entities as the Bank of Canada and the Canadian Wheat Board combine both public ownership and regulatory functions.

What was said by the Rowell-Sirois Commission about the long term effects of governmental intervention during World War I applies with even greater force to the experience following World War II. Those who created Canada's war-time economic machine remained at the helm during the period of reconstruction. And though most of the war-time state enterprises engaging in activities traditionally carried on by the private sector were discontinued after the War, many of the agencies created during World War II continued to operate afterwards.

Governmental organizations continued to proliferate in the post-war period. Further specialized bodies such as the Atomic Energy Control Board (1946) were set up. Canadian involvement in the setting up of NATO, the maintenance of a Department of Defence Production and the commitment of about one-third of the federal budget to defence matters, led to a substantial expansion of the federal public service during the early years of the Cold War.

During the economic booms of 1946-49 and the Korean War period, a network of marketing boards spread across the country. When, in 1952, the Supreme Court of Canada decided in the case of *P.E.I. Potato Marketing Board v. Willis* [1952] 2 S.C.R. 392, 4 D.L.R. (2d) 146, that regulatory

power within the jurisdiction of the federal government could validly be delegated to boards created and operated by a provincial government, and vice versa, by implication this encouraged the creation of yet more independent administrative agencies, in the interests of cooperative federalism.

Welfare state activities blossomed. At the federal level, the Family Allowances Plan (1944), the Old Age Security Pension (1952) and the Canada Pension Plan (1965) joined the earlier established veterans' allowance and unemployment insurance benefits programs. Government intervention was also marked in respect of disposition and use of manpower, perhaps encouraged by large waves of immigrants. More recently, a rising tide of regulations, service and subsidization endeavours has added to the growth of government to the point where at least forty per cent of gross national income is expended on state-related activities. The number of civil servants has at least doubled since the end of World War II. In the words of John H. Deutsch writing in 1968:

> The life of the public service is closely bound up with the role of the state in society. One of the most striking features of the history of our time has been the large and persistent increase in the activities of government. Over the hundred-year span of Canada's history, the changes have been truly remarkable. During this period, Canada's working population has increased about seven and a half times, but the number of employees in the public service of the federal government has risen by approximately one hundred times. In 1867, less than one out of every hundred of the working population was employed by all governments — federal, provincial, and municipal. Today at least one in every eight is on a government payroll. At the time of Confederation, total government expenditures were in the order of 5 per cent of the total gross national production. Today, they are in the order of 32 per cent.[52]

All the agencies forming the subject of specific studies by the Commission — the Anti-dumping Tribunal (ADT), the Atomic Energy Control Board (AECB), the Canada Labour Relations Board (CLRB), the Canadian Radio-television and Telecommunications Commission (CRTC), the Canadian Transport Commission (CTC — created as an umbrella commission in 1967, under which the Board of Transport Commissioners, the Air Transport Board, and the Canadian Maritime Commission were merged), the Immigration Appeal Board (IAB), the National Energy Board (NEB), the National Parole

Board (NPB), the Pensions Appeals Board (PAB), the Tariff Board and the Unemployment Insurance Commission (recently merged with the new Employment and Immigration Commission) — were either created or reconstituted in the post-war years.

However, these agencies are not the only kinds of non-departmental governmental organization that have developed in Canada over the years, and particularly since World War II. There are many others serving variegated functions, for example, purely advisory bodies such as the Law Reform Commission itself. There are as well quasi-departmental structures administering programs established to handle the overload of regular departments and which report through the same Minister. Crown corporations also continue to grow in numbers and prosper as an institutional form.

As of 1979, the government continues to experiment with various ways of organizing public administration. It is interesting to note that one of the agencies studied, the Unemployment Insurance Commission, was integrated with the Department of Manpower and Immigration in 1976. The new entity, Canada Employment and Immigration, is both a department and a commission, retaining labour and management representatives who serve as Assistant Deputy Ministers as well as Commissioners. Such a creation does not bode well for students of government who like to learn about accountability and administration through the use of organizational charts, but it might facilitate cooperative federalism by allowing inter-delegation of powers between the federal and provincial governments to such hybrid bodies in their capacity as independent agencies.

Regardless of the proliferation of various governmental bodies, departments continue to play a central role in public administration. Deputy ministers and their senior policy advisers can have significant influence on the operations of related agencies sharing the same responsible minister with them, depending on arrangements between the Minister, the deputy minister and the chairman of the agency. It should not be forgotten either that the departments sometimes engage in

functions similar to those performed by agencies. For example, several are engaged in licence granting and revocation. And income tax and immigration appeals were formerly dealt with by appeal procedures internal to departments, a way of proceeding still employed in connection with applications for patents, and food and drug regulations.

Although the structures and functions of the machinery of administrative government are not delineated or allocated in the most rational manner at the present time, one institution which presently provides common guidelines for various federal administrators dealing with similar problems is the recently constituted Federal Court, which replaced the old Exchequer Court. Under the *Federal Court Act*,[53] which came into force in June, 1971, all federal statutory administrative authorities were brought under the exclusive jurisdiction of a federal court for the first time. Previously, the general power of judicial review over them resided in the superior courts of the provinces. Other mechanisms which might serve to improve the machinery of federal administration, the administrative process or the review of administrative action will be mentioned later.

CHAPTER TWO

Independent Agencies and the Administrative Process

The use of an assortment of administrative authorities with differing mixes of powers and procedures, to achieve diverse mandates, has long been a source of concern to critics of Canadian government organization. Speaking specifically of the independent agencies, the Glassco Commission on Government Organization made the following comments in its 1963 report:

> Generally, your Commissioners were struck by the lack of any consistency in the status, form and procedures of the tribunals examined. It is noted that, during the past three decades, in both the United Kingdom and the United States these matters have been the subject of official inquiries and extensive public discussion, resulting in a variety of general legislative efforts to establish greater consistency of principle and regularity of form and practice. Nothing comparable has occurred in Canada and the limited findings of your Commissioners suggest the need for a comprehensive study of this important field.[54]

Although the Glassco Commission had a considerable impact on government structures, the type of comprehensive review it suggested has never been undertaken. In contrast, the Law Reform Commission has engaged in a research project of modest dimensions involving the empirical study of independent agencies. They are defined as legal entities or branches of the government, aside from departments or Crown Corporations, most of which are directly assigned their mandates and powers by Parliament, and which report to or

through a minister of the Crown. Specifically, the Administrative Law Project has studied a limited number of independent collegial bodies operated by government appointees who make rules or decisions which affect the rights of private parties either as individuals or as a group.

A. The Role of Independent Agencies in Government

As an organizational phenomenon, independent agencies are by definition set up as specialized bodies separate from departments or other ministerial services, and have considerable autonomy from the executive branch of government. But since, unlike the judiciary, they are not separated from Cabinet influence by constitutional convention, it is unclear how the political norms of parliamentary democracy and ministerial responsibility apply to them.

The wisdom of allocating government decision-making functions to entities other than departments and the judiciary has been a subject of serious debate in common law countries. Some even raise serious questions about the legitimacy of doing so. Thus the then Home Secretary of the United Kingdom, Mr. Reginald Maudling, had this to say in the British House of Commons a few years ago:

> I can assure honourable Members I have never seen the sense of administrative law in our country because it merely means someone else taking the Government's decisions for them.[55]

Such criticisms merit attention, if only to qualify or reject them. Certainly, the solution of any policy issue which demands the brokerage of contending interests calls for heavy involvement by elected officials. No one can reasonably expect such an issue to become non-partisan by channelling it through a particular form of bureaucratic organization, such as an independent agency.

Furthermore, a number of the reasons traditionally given in favour of setting up independent agencies may well be suspect. Two qualities which were once said to be pre-eminent in independent agencies — impartiality and collegial policy-making and decision-making — may be at least as prevalent within departments. A professional public service following regularized procedures with predetermined standards for decision-making, can act impartially. Effective collegial operations can be developed using committees or appropriate supervisory and consultative techniques. Two other qualities, expertise and continuity, have been provided in the recent past to a greater degree by independent agencies than by departments because of too frequent changes in top level personnel in the latter. But here again there is no reason why executive personnel practices could not be changed to improve the performance of departments.

On the other hand, the needs of government or the nature of the private interests concerned may call for the creation of an independent agency. This point may be most easily brought home by looking at reasons usually cited for the creation of independent agencies:

(1) where there was a perceived need for a specialized body not too closely identified with the government to deal with repeating or continuing economic or business problems of a particular kind, such as regulating and rate-making in the railway and then in the telecommunications field;

(2) where it was thought desirable to hive off an issue from traditional politics and to relieve Ministers of the burden of having to account for sensitive decisions, such as the allocation and issuance of licences regarding radio and television broadcasting;

(3) where adjudication of a substantial number of individual cases of a similar kind was involved, and it was undesirable to add to the caseload of the regular courts, examples being matters handled by the Immigration Appeal Board or by the Tax Review Board, or where the subject matter was so

specialized that the regular courts could not ordinarily be expected to spend their time on it, an example being the appellate duties of the Tariff Board;

(4) where there was a need for the government to create a body and give it a mandate to act in response to a particular set of issues, but no existing body seemed quite suited for the task and the establishment of a new department to handle the matter would not have been justifiable at the time, an example being the creation of the National Energy Board to be responsible for the energy sector prior to the creation of the Department of Energy, Mines and Resources; and

(5) where it was desired to give special visibility to a relatively autonomous administrative program, and where a collegial body could best represent interests responded to in that program, an example being the Unemployment Insurance Commission (although that body has now been merged in Employment and Immigration Canada, which is both a department and a commission).[56]

Two other factors have played an important role in the creation of independent agencies. They are: first, the need to use non-departmental entities as the mechanisms to exercise powers cross-delegated between the federal and provincial governments, given the present state of Canadian constitutional law; and second, the fact that the Canadian and United States economies are largely integrated, and that the United States, which is the more populated country and the centre of much North American business decision-making, has numerous independent agencies at both the federal and state levels that perform tasks analogous to those which Canadian governmental entities are expected to perform.

There is no indication that the network of independent agencies will disappear in the near future. However, the institutional context within which they interact with the three traditional branches of government provides them only an uneasy existence at the present time. As between Parliament and the government of the day, it is difficult to say whose

agents they are. Agency enabling legislation often has limited content and Parliamentary review of agency operations is minimal. On the other hand, intervention by the Cabinet or the responsible Minister has sometimes appeared to be arbitrary and proved to be worrisome to applicants or other participants in proceedings before regulatory agencies. The role of the Federal Court through judicial review of administrative action has also been brought into question, owing in part to how its administrative law jurisdiction is delimited under sections 18 and 28 of the *Federal Court Act*.[57]

Problems arising out of the relationships between independent agencies, Parliament, the government of the day and the courts, as well as particular problems resulting from haphazard drafting of legislation relating to structures and powers of statutory agencies, are treated further in subsequent chapters. However, responses to these types of problems may be no more central to the development of a contemporary administrative law for agencies than the evolving rules respecting administrative proceedings carried on by the agencies themselves, a subject treated in Chapters Five and Six.

Before making recommendations responsive to particular problems relating to independent agencies, however, it is desirable to give an overview of the categories of agencies and what they do, and to describe basic elements of the administrative process. This chapter indicates the orientation the Commission has taken toward classifying agencies in terms of areas of societal activity in which they are involved, as well as in terms of modes of governmental involvement. It also delineates some of the highlights of the administrative process which, after all, is the object of most administrative law.

B. Classification of Agencies

Varying motives have provided the impetus behind the establishment of the diverse independent agencies, and the

differences in provisions from one enabling statute to another might justify a critic to say that almost every agency was *sui generis* and could be placed only in a category of its own. However, at a certain level of abstraction, all agencies studied in the context of this Project, indeed, administrative authorities in general, carry out activities relating to economic or social matters, broadly defined.

Another category of activity engaged in by other administrative authorities, which was by definition excluded from this project, is work of internal interest to government where decisions on private sector interests are not made as such, although private services might be used. Agencies engaged solely in research and advisory work for the government fall into this category. Of course, an agency or other authority can be designated to carry out more than one type of activity, and sometimes conflicting functions are assigned to one body.

In this section we classify social and economic agencies into sub-categories according to the principal purposes they serve. The classification of agencies is not merely an academic exercise. Each type of administrative authority has its own peculiar characteristics which may call for special legal treatment. Therefore, before making prescriptions for administrative law reform respecting independent agencies, it is important to survey the spectrum of existing agencies.

1. *Economic Agencies*

The government may choose to regulate private firms in a given sector of the economy by means of licensing, setting standards and enforcing them through inspections, investigations and the invoking of sanctions, rate-making and the like. The National Energy Board, the Canadian Transport Commission, or the Canadian Radio-television and Telecommunications Commission are three major regulatory agencies.

On another level, the government can focus on promoting commercial and industrial endeavours. This can be accomplished not only through governmental agencies, but also

by setting up Crown enterprises or nationalizing private sector ones. Canadian National Railways, the Canadian Broadcasting Corporation, Air Canada, and Eldorado Nuclear Limited come to mind. Of course, most regulatory agencies have promotional aspects to their activities. But some agencies have promotion as their major interest; the Canadian Egg Marketing Agency and other farm products marketing boards are examples. The Canadian Wheat Board and the Atomic Energy Control Board as presently constituted are also very interested in promoting undertakings in their sectors of jurisdiction.

Agencies may be established, of course, to further the interests of the state in regulating commercial or industrial undertakings in general as opposed to regulating a particular economic sector. These may be labelled regulative agencies to distinguish them from the regulatory ones mentioned above. Various examples may be cited. The Restrictive Trade Practices Commission holds formal hearings to reach conclusions regarding anti-competitive practices prohibited by the *Combines Investigation Act*,[58] and makes recommendations about appropriate remedies in reports to the Minister of Consumer and Corporate Affairs. The Tariff Board inquires into and reports upon any matter in relation to goods which are subject to, or exempt from customs duties or excise taxes about which the Minister of Finance desires information. The Anti-dumping Tribunal, if so authorized by Order-in-Council, may inquire into any matter involving serious prejudice to Canadian production caused by foreign imports.

Another type of agency, the jurisdiction of which relates to economic activities, is the labour relations board. At the federal level, there are two such independent boards. The Canada Labour Relations Board works to contribute to effective industrial relations in any work, undertaking or business operating within federal jurisdiction. This includes the certification of bargaining agents, disposition of complaints relating to unfair labour practices and declarations of unlawful strikes or lockouts. The Public Service Staff Relations Board administers the *Public Service Staff Relations Act*,[59] which established a system of collective bargaining, a grievance process and an adjudication procedure for the federal public service. It has

been remarked that labour relations boards are unique among administrative agencies regarding their manner of functioning and the issues their operations pose with respect to traditional administrative law. It is, thus, not surprising that labour law practitioners are often most vociferous in attacking the current state of affairs in administrative law, especially regarding judicial review of administrative action.

Some independent agencies act as administrative tribunals to adjudicate questions regarding commercial or industrial matters, either at first instance or on appeal from decisions of other administrative authorities. The Anti-dumping Tribunal holds formal hearings of an adjudicatory nature to determine whether the dumping of goods has caused, is causing, or is likely to cause material injury to the production in Canada of like goods. The Tariff Board, under provisions of the *Customs Act*,[60] the *Excise Tax Act*[61] and the *Anti-dumping Act*,[62] hears appeals from rulings of the Department of National Revenue (Customs and Excise) on such matters as excise taxes, tariff classification, value for duty, drawback of customs duties, and determination of dumping.

One agency functioning solely as an appellate tribunal is the Tax Review Board, which exercises appellate powers with respect to the Minister's assessments of tax under the *Income Tax Act*.[63] Proceedings before this Board involve strictly the application of statutory provisions and regulations to the case in question. The taxing power is, of course, so central to the very existence of the machinery of government and public sector programs that authorities administering it can be viewed as performing both economic and social activities.

2. *Social Agencies*

Switching now to social agencies, we might turn first to agencies carrying out benefactory functions, that is, those concerned with distributing welfare benefits. Two examples are the Employment and Immigration Commission and the Canadian Pension Commission. The branch of the Employment and Immigration Commission which carries on the func-

tions of the old Unemployment Insurance Commission pools contributions by employees and employers to the Unemployment Insurance Account and determines the benefits payable to unemployed workers under the *Unemployment Insurance Act*.[64] The Canadian Pension Commission deals principally with questions related to pensions claimed for armed forces veterans or their families under the *Pension Act*,[65] or claims under the *Civilian War Pensions and Allowances Act*[66] made by individuals from civilian groups who were specially engaged during World War II.

In connection with federal benefits programs, there are several bodies which hear appeals from initial decisions by administrative authorities. Three independent benefits appeal tribunals deserve mention: the Pension Appeals Board hears appeals in general under the *Canada Pension Plan*[67] and the *Unemployment Insurance Act*,[68] as well as appeals from contributors under the Quebec Pension Plan;[69] the Pension Review Board hears appeals from final decisions of the Canadian Pension Commission; and the War Veterans Allowance Board hears appeals from decisions made by District Authorities administering the *War Veterans Allowance Act*.[70]

There are other social agencies dealing with questions of personal status. The National Parole Board is one example. It is required to decide whether a person should be released from imprisonment and the conditions of release. The issue is usually perceived to be more of an individualized one than pensions or other benefits cases, probably because the major value at stake, liberty, is one which has always been closely guarded by judges. But unlike decisions to deprive people of liberty, which are conditioned on legal standards established by courts, the decision to restore liberty has been left to the absolute discretion of the Board. Parliament has reposed in the Board much of the responsibility for developing policies governing parole.

The Canadian Human Rights Commission is concerned with both individual and group status. Established in 1977, it deals with complaints regarding discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex,

marital status, conviction for which a pardon has been granted and, in matters related to employment, physical handicap.

An example of a social agency which acts as an appellate tribunal on matters of status is the Immigration Appeal Board. Its major duty is to review decisions to deport persons made by immigration authorities and, in so doing, to determine whether a decision was based on an error of law or of mixed law and fact.

Another type of social agency is the granting agency or cultural promotional one. Prime examples here are: the Canada Council, designed to foster and promote the study and enjoyment of, and the production of works in the arts; and the Social Sciences and Humanities Research Council, designed to promote and assist research and scholarship in the social sciences and humanities.

In summary, independent agencies falling under the terms defined by this project come within two categories, either economic or social agencies. Economic agencies are primarily either regulatory, regulative or promotional, or are tribunals acting to adjudicate issues at first instance or on appeal. Social agencies are primarily oriented toward distributing benefits, treating issues of status or promoting cultural activities, or are tribunals. As was stated earlier, this Working Paper does not examine research bodies such as the National Research Council, or advisory bodies such as the Science Council, the Economic Council or the Law Reform Commission.

The independent agencies' legal relations with the three traditional branches of government, and the manner in which they carry out administrative proceedings with regard to the clientele or relevant publics they regulate or serve, should be a reflection of how they are structured by statute and within the organizational framework of government. Agencies designed to distribute large volumes of welfare benefits presumably involve different interests from agencies dealing with the liberty or freedom of movement of individuals. Accordingly, they might need to establish different procedural routines and safeguards. A regulatory agency dealing directly with a limited

industrial constituency but having to take into account various other interests and to weigh alternative lines of policy might perform differently, especially respecting the right of interested persons to participate in administrative proceedings, from a regulative agency implementing specific legal rules which touch upon variegated and sometimes not immediately identifiable interests.

Classifying governmental bodies from an administrative law perspective should assist in ascertaining what the present machinery of government is doing and how administrative activities should be organized or carried out differently in the future. Tribunals assigned court-like functions should, for example, be examined to see whether the activities on which they make decisions should be dealt with in a judicial fashion at all; and, if so, whether the functions of certain tribunals should be transferred into the judicial branch of government.

C. The Administrative Process

Having surveyed the various types of independent agencies, we now look at the administrative process. The administrative process comprises activities undertaken by administrative authorities, including independent agencies, which lead to administrative decisions and acts from which direct effects on the legal interests of persons are derived. Administrative activities cover a broad spectrum, as was indicated by what the surveyed agencies do, and no single authority engages in all the activities along the spectrum.

At the broadest level of abstraction, all the independent agencies studied by the Commission engage in two basic types of administrative action, law-elaboration and law-application. Law-elaboration consists of the development of relatively specific legal criteria to guide and structure administrative action. Rules, standards or policy guidelines are usually derived from more general criteria provided by official sources

of law such as legislation, case law, and ministerial or Cabinet regulations or directives. However, criteria sometimes originate from commercial usage, custom and established administrative practice. Law-application consists of the application through agency decision-making of legal criteria generated from agency or other official sources to specific cases, plans or programs.

In order to carry out administrative action effectively, it is important that administrative authorities utilize the technical resources and expertise at their disposal. Agency decision-making may depend heavily on the collection and analysis of relevant information or on the informed opinion of agency members, staff or outside specialists who possess expertise in a given field. Various methods are used to acquire information. Some agencies conduct and fund research; some conduct inspections or investigations or engage in other formal or informal fact-finding procedures, including hearings and meetings and consultations with people who have an interest in their decisions.

Using the information and expertise at their disposal, agencies are also involved in policy formulation, interpreting and shaping the roles they are to play. This may be accomplished by making broad general rules, by deciding individual cases or even by issuing informal staff directives and guidelines. As an extension of their policy roles, agencies may be involved in giving advice to the government and to other agencies, thereby participating directly in government policy formulation.

To a large extent, information gathering and policy formulation are preliminary to deciding specific issues. Such decisions usually create or alter legal relationships, for example, deciding whether someone is entitled to a licence to operate within a regulated area of activity. This may involve allowing or rejecting applications for licences, or placing conditions on those which are issued. Often this will lead to decisions about enforcement, decisions to investigate people and to sanction through measures like licence suspension or revocation. Decisions are also made in the course of administering schemes

that confer statutory benefits and privileges, particularly social welfare benefits like pensions and unemployment insurance. Decisions are made to grant, refuse, suspend and terminate these benefits and to enforce statutory rules laid down to govern their administration.

Agencies make decisions having various orientations. Some are inherently managerial and affect mainly the people within the agency. Here the effect on people who deal with the agency and the general public will usually be of a very general nature, although the allocation of research, inspection or enforcement personnel, not to mention agency members, can have specific effects. A few decisions arise from questions the government refers to an agency such as the Anti-dumping Tribunal or the Tariff Board, and may have only tangential effects on private parties. Most official decisions, however, principally those involving the dispensing of economic privileges or social benefits, or the invoking of sanctions, will be felt more directly by people outside the agency.

Many decisions will be directed at particular individuals or will deal principally with an isolated situation or set of circumstances. These might be referred to as "individualized" decisions. Others, however, especially where major commercial or cultural undertakings are at stake, will affect a large number of interests and may reflect the possibility of a multiplicity of potential solutions which are dependent upon many variables. These might be referred to as "polycentric" decisions.[71]

The distinction between "individualized" and "polycentric" issues becomes particularly important in considering how an agency should proceed in resolving them. Accordingly, it is relevant to consider any function an agency performs in the light of a number of questions. To what extent does the decision involve broad economic or social issues? Does the decision primarily involve the determination of a given issue within a narrow factual context, or does it have broad ramifications in terms of long range policy? Even if only one individual's case is before the agency, does the decision have to take into account a general government program or policy, for

example, unemployment benefits? The choice of a focal point for the decision-maker's attention can be a key factor in the way discretionary power is exercised. Is the decision-maker confined to well-defined guidelines or does he have the responsibility to settle the policy which is to guide his decision? These considerations were stressed in the *Catalogue of Discretionary Powers*[72] and their importance becomes more evident as we develop issues throughout the course of this Working Paper.

Another aspect of the administrative process must be borne in mind. While we tend to focus predominantly on the formal functions and discretionary decision-making powers of agencies, Cabinet Ministers and departmental officials which are stated specifically in statutes or regulations, it is obvious that the process cannot be defined solely in terms of these functions and powers. There is a wide range of agency activity which has not been catalogued, and can be referred to as "informal agency action". Agencies, especially those engaged in the administration of social security schemes like unemployment insurance, are involved daily in giving informal advice and in interpreting statutes and regulations to provide policy guidelines for that advice. On the basis of this advice people may be dissuaded from exercising lawful rights or denied access to certain benefits, all in a casual and informal way falling outside the strict decision-making functions described by the statutory or regulatory mandate of the agency. Yet this is the level at which many people interact with many agencies, ignorant of the policies and practices serving, sometimes legitimately and sometimes illegitimately, as guidelines for disposing of their requests. For many people this represents a more real form of administrative action than functions like issuing licences and approving rates and tariffs.

To control the exercise of their discretionary powers, agencies make further decisions about the procedures they will follow in performing administrative acts. Rules, guidelines or practices then are established which help to structure the law relating to administrative procedures. This law embraces informal as well as formal administrative activities and is not

limited to rules regarding formal public hearings, important as these may be.

Finally, for the independent agencies, the administrative process is maintained and developed by agency members, counsel and staff officers. The virtues and capacities of these persons, especially the professional standards of the members themselves, are of critical importance in meeting agency objectives and in serving the goal of administrative justice.

D. Conclusion

Our intention here has been simply to give an impressionistic overview of the varying duties and fields of activity of agencies and to state briefly certain matters which agencies must take into account in dealing with the three traditional branches of government and in carrying out the administrative process. Further information is available in our agency studies. Having looked in this general way at agencies and the context within which they operate, our focus now shifts towards assessing problems they face or pose and what might be done about them.

In the following pages, we discuss objectives for the administrative process as well as the legal and political structuring of administrative action, leading to ultimate suggestions about how reform should be approached. Principally, we seek a legal framework within which administrative powers can be exercised, a framework allowing limits to be set on the exercise of these powers without eclipsing the governmental purposes they are designed to serve.

CHAPTER THREE

The Legislative Framework and the Role of Parliament

The independent administrative agencies studied by the Law Reform Commission to date are all creatures of statute. The specific terms of the enabling legislation of each particular agency act as a prism through which the principles of administrative law, as interpreted by the agency, review bodies or the courts, are refracted.

Common law countries, however, have never been quite sure what role legislation should play in the law of public administration. The alliance of convenience between Parliament and the common law judiciary carried the day against the Crown's claim to extensive absolute royal prerogatives at the time of the English Revolution of 1688. However, this set the stage for questions yet to be resolved regarding the relative importance in various situations of legislation, case law and the prerogative as sources of public law, and how best to deploy them in structuring and controlling administrative authorities in countries following the British model of parliamentary democracy.

A. Necessary Reforms Concerning Legislation

1. *Legislative Planning*

At the federal level in Canada, governments have frequently set up new statutory authorities without making sure that their structures, functions, powers and procedures fit rationally within the existing administrative framework. It frustrates the value of comprehensibility in the law to have unnecessary variations in the organization and practices of governmental bodies. The Law Reform Commission recommends that:

> 3.1 *where agencies have analogous purposes, they should be designed along similar lines. In relation to similar types of functions carried out by various agencies, there should be similar sets of powers relating to those functions, drafted in uniform terminology. Agencies with similar types of powers and procedures should also have the same statutory label.*

For example, those exercising primarily a judicial type of function might be labeled tribunals. Taking these steps would encourage the development of some degree of rationalization in agency activities.

Recently, the planning and drafting of legislation and regulations which touch upon government organization have been heavily dependent not only on lawyers who work in the Legislative Drafting Section of the Department of Justice but also on officials in the small secretariat in the Privy Council Office who deal with the Machinery of Government, Cabinet Ministers and their key advisers, and lawyers in the various departmental or agency legal services.

Many administrative authorities, even within the same category of governmental bodies, end up being unique in structure because of the particular political tradeoffs involved in getting them approved by the Cabinet and Parliament. Sometimes further variations are unintentionally put into the

terms of enabling Acts of such authorities. This happens either because of the pressures on legislative drafters to produce draft bills as soon as possible after Cabinet approval is obtained, or because officials involved in preparing specific details on proposals do not take sufficiently into account the matter of how to fit them into the existing framework of governmental organization with the maximum appropriate consistency of statutory provisions.

We recommend that:

3.2 *the Government consistently follow the practice of preparing in advance a list of legislation to be introduced according to priority in each session of Parliament, and legislative drafters be engaged in the preliminary preparation of legislation early in the planning process.*

Better drafted and more consistent legislation and regulations relating to the structure, powers and procedures of statutory authorities will require more time in developing a conceptual framework between the time legislative planners and drafters begin their work and the time the draft legislation is tabled for first reading in Parliament.

2. *Legislative Drafting*

Enabling legislation for statutory authorities should, as much as possible, be comprehensible to the lay person as well as to specialists. Their impact on all of us is too great to be left solely to the understanding of experts. Accordingly, we recommend that:

3.3 *legislation should be drafted in plain language and arranged in a logical and intelligible manner instead of using antiquated conventions and archaic terminology.*

For example, the agency study on Unemployment Insurance Benefits criticized the relevant legislation for failing to use sufficiently simple language, and to structure the pertinent procedural provisions logically enough, for those affected by it to be able to understand it.[73] The *Income Tax Act*[74] is another example of legislation which affects most of us but is so

complex as to be virtually incomprehensible except to specialists. To be fair to legislative drafters, a major reason for their using complicated phraseology stems from the fear of courts misinterpreting statutes and departing from their intended effect if their drafting style were changed and language simplified. But surely modes of statutory interpretation as well as drafting can stand improvement.

Since its creation, the Law Reform Commission has been interested in making improvements in legislation. Recently, we have prepared two checklists which legislative drafters could use as a means of correcting common oversights committed unintentionally in the drafting process. We recommend that:

> 3.4 *legislative drafters should use model checklists to ensure conformance of draft legislation with basic requirements of form, phraseology, and substantive law.*

The Law Reform Commission also has prepared what we believe to be an appropriate format for drafting legislation focussed principally on the establishment of independent administrative agencies, as opposed to legislation such as the *Immigration Act*,[75] the *Canada Labour Code*,[76] or the *Anti-dumping Act*,[77] in which such agencies are treated as mechanisms in a larger administrative process, most or all of which is referred to within the context of a single statute. It has used that format in preparing a model Act using the Canadian Dairy Commission as the subject agency. We recommend that:

> 3.5 *for the sake of consistency and comprehensibility in administrative legislation and organization, the same basic format should be followed when possible in all cases where the same type of legislation is involved.*

3. *Improving Federal Statute Books*

It has long been recognized that Canadian federal statute books need improvement if they are to be of effective use to lay persons or general practitioners of law as well as to legal specialists. The government has already established a mechanism through which legislative provisions might be kept

current in a publishable form. The Statute Revision Commission, consisting of three Department of Justice legal officers appointed by the Minister, was established under the *Statute Revision Act*, 1974,[78] and was given the power to "arrange, revise and consolidate the public general statutes of Canada" and to "prepare, maintain and keep up to date a consolidation of the regulations of Canada". The Commission was given a priority task of producing an up to date set of volumes of Consolidated Regulations, and this project has almost wholly occupied its time for the past several years. However, once this task is done, there are several improvements to the statute books themselves it should consider for implementation.

One element now missing from the federal statute books is an effective system of indexing. As was pointed out in a Commission Report on *Evidence*,[79] a more sophisticated indexing system, phrased in lay persons' vocabulary, is needed to provide more subject access to statutes. The "Act analyses" in the Index to the 1970 Revised Statutes of Canada are often little more than glorified tables of contents rather than true subject entries. We recommend that:

> 3.6 *comprehensive subject indexing, with references appropriate for lay readers as well as specialists, should be prepared for the Revised Statutes of Canada and for each new volume of statutes as it appears. Indexing of individual Acts should be continued as part of the general index.*

As a complementary measure, we also recommend that:

> 3.7 *a summary of legislative provisions should be placed at the beginning of statutes, especially those which are long or complicated.*

Even if summaries of legislative provisions and detailed indices of statutory terminology are provided in the statute books, persons who are not specialists in a particular field of law might have trouble in ascertaining what a given statutory rule means. Consequently, we recommend further that:

> 3.8 *the Government should sponsor the publication of the Statutes of Canada Annotated, statutory rules being*

annotated with explanatory notes to promote comprehension of the law.

4. *Problems Inherent in Broad Statutory Mandates*

A problem common to a number of agencies, particularly those having the duty to regulate economic activities, is that they are asked to function as subordinate legislative bodies with broad mandates, vague goals and priorities which are not necessarily consistent with one another. This type of problem should be weighed by responsible authorities when legislation is at an initial planning stage. Conflicting priorities can appear on the face of a statutory purpose section. This occurs, for example, in section 3 of the *National Transportation Act*,[80] which states:

> 3. It is hereby declared that an economic, efficient and adequate transportation system making the best use of all available modes of transportation at the lowest total cost is essential to protect the interests of users of transportation and to maintain the economic well-being and growth of Canada . . .

In the case of the Canadian Radio-television and Telecommunications Commission, no initial purpose section was inserted in its enabling Act. However, section 14 states that the objects and powers of the new CRTC in relation to broadcasting are those laid down in the *Broadcasting Act*,[81] and that the powers, duties and functions in relation to telecommunications which had been vested by the *Railway Act*,[82] the *National Transportation Act*[83] or any other act of Parliament in the Canadian Transport Commission, were henceforth vested in the CRTC.[84] The problem of reconciling different goals seems to be built into the structure of such agencies, and it is a question of policy as to which goal receives the greatest attention at any given time. Naturally, it is important that the government be given some opportunity to respond to, or to direct, agency programs in areas with heavy policy content or political overtones where there are vague or conflicting goals in an agency mandate. This is discussed further under the heading of "Directive Power" in Chapter Four.

When conflicts between agency goals are particularly severe, the pursuit of different goals should be assigned to

different authorities. Acute problems can be raised regarding agencies with both regulatory and promotional goals when a regulated industry is one which has been largely developed by the government, or where there are intimate government-industry working relationships. An example has been the relationship between the Atomic Energy Control Board and the nuclear industry, much of which industry in Canada, outside the mining sector, has been government owned. Steps have recently been taken to meet this problem. A draft Nuclear Control and Administration Act, introduced before Parliament in November, 1977,[85] would have given regulatory responsibilities to a reconstituted Board while giving the responsible Minister commercial and promotional powers in the field.

Conflict of goals can also arise where an agency is given both regulatory and advisory powers. The National Energy Board, for instance, has the responsibility of issuing licences for pipeline construction and energy exportation, and controls pipeline tariffs, while taking into account values like "public convenience and necessity". But quite apart from this duty, it must also continuously monitor developments in the energy field, and can be required to prepare studies and reports on energy matters and make policy recommendations to the responsible Minister. This can lead to tensions among the members and staff, and can raise questions in the minds of concerned individuals. For example, the past experience a member of a regulatory agency has had with projects in a given industrial sector might, in the event that the member sits on a panel hearing an application for a similar type of project, lead to an apprehension or fear of bias on the part of members of the public.

The government has in the past acted to hive off from institutions certain tasks which were incompatible with some of their other tasks. Thus, in 1952, the investigatory and adjudicative aspects of combines law enforcement were separated; the Restrictive Trade Practices Commission now appraises and reports to the Minister of Consumer and Corporate Affairs on situations which might warrant prosecution under the *Combines Investigation Act*,[86] but the investigation is carried out by a separate official, the Director of Investiga-

tion and Research. Similarly, the CBC was divested of its regulatory jurisdiction over private broadcasters in 1958; the CRTC now exercises regulatory control over both the CBC and private organizations.

In other cases, agencies have been able to perform diverse functions successfully. The Canadian Wheat Board, for example, apparently combines adjudicative and marketing functions quite successfully. Given its operation of a world-wide wheat marketing scheme, many of its decisions are highly influenced by world market conditions and international trade agreements. Others, however, are more concerned with inequities among the participants in a mandatory statutory marketing scheme. The Board must make decisions on matters like delivery quotas, which involve the imposition of controls on grain producers and elevator operators who are involved in grain production, storage and distribution and whose livelihood is directly affected by quotas imposed by the Board.

5. *Agency Status as a Court of Record*

The perceived status of an agency is quite important, and can impress a particular character on its operations and influence its relations with interested persons and with other governmental institutions. The language used in an enabling Act to label a statutory authority can thus assume considerable importance. For example, the term "court of record", as applied to statutory authorities, has been a source of great misunderstanding. Its interpretation in cases before the courts has resulted in some confusion, as was revealed by a Commission research paper.[87] The demand placed by the courts on agencies is possibly influenced by whether they are designated by statute as courts of record and given "all such powers, rights and privileges as are vested in a superior court of record".[88] Thus, the Federal Court of Appeal has placed heavy demands on the Anti-dumping Tribunal, a court of record, to keep proper records, follow judicial procedures and make decisions based only on information placed on the record during official proceedings.[89] Perceptions can stray the other way, however. The Immigration Appeal Board, also a

court of record, initially interpreted its status and powers to be closer to those of a traditional court than the Federal Court of Appeal was willing to allow.[90]

Further confusion resulting from the use of the term occurred when the first Chairman of the Canadian Transport Commission did not permit the CTC to engage actively in policy-making initiatives which it was encouraged to take under the terms of the *National Transportation Act*. From that time on, critics have accused the CTC of following what has been called "the court of record syndrome", waiting to act until concrete cases demand immediate resolution, when a matter has become a problem, rather than actively dealing with situations before difficulties arise.[91] The first CTC Chairman also refused to answer questions posed to him in Parliamentary Committee on proceedings which had been held before that body regarding the discontinuance of railway passenger service in Newfoundland, on the ground that the CTC was a court of record and thus a judicial body. Since there remained the possibility of continued judicial proceedings on the matter, the Chairman said, he could not make any pertinent comments or responses.[92]

On the basis of the individual agency studies conducted to date, and the Commission research paper on the use of the term "court of record" in the case law, we recommend that:

> 3.9 *the practice of according powers to an agency by declaring it a "court of record" should be abandoned. More specific drafting terminology should be developed to deal with the various issues of status, powers and procedure, such as problems of contempt, which the present term has been used, in different ways at different times, to cover.*

6. *Appropriate Blends of Functions, Powers and Procedures*

In the legislative planning that goes into the structuring of an independent administrative agency, undoubtedly the most

difficult task is to create an agency with the appropriate blend of functions, powers and procedures so that values such as effectiveness, fairness and openness can be implemented to a high degree. Public law in Canada is not yet at a stage where there is general agreement on what procedures, powers and functions blend well together. A unifying perspective as to how problems regarding the creation of such appropriate blends might be approached could perhaps best be achieved following experimentation by various agencies using hybrid combinations of powers and procedures, which would be monitored so that successful experimentation could be carried forward into permanent practices.

7. *Investigative Powers, Enforcement and Sanctions*

Adequate and appropriate investigative powers are essential to the work of many administrative authorities. But the federal government has tended to give authorities the general powers of a commissioner appointed under Part I of the *Inquiries Act*[93] without reflecting on what powers were actually necessary. An example is the granting of such powers to an adjudicator under the *Immigration Act* 1976.[94]

Not enough is yet known in comparative terms about the use of investigative powers to enable us to make useful general suggestions for reform. However, if the *Inquiries Act*[95] were amended along the lines suggested in our Working Paper on the subject, then provisions in the enabling legislation of other authorities giving their investigators the powers of a commissioner under the *Inquiries Act*[96] would have to be reconsidered. In any event, although this technique of incorporation of powers by reference provides a short-cut in legislative drafting, we believe that only those investigative powers which are relevant to duties assigned to officials should be granted to them.[97] We recommend that:

> 3.10 *the practice of granting blanket administrative powers by, for example, adopting by reference the investigative powers given to a commissioner under Part I of the Inquiries Act should be abandoned.*

Our studies of individual agencies have confirmed that certain agencies have problems relating to the enforcement powers at their disposal. For example, the compliance programs of the National Energy Board[98] and the Atomic Energy Control Board[99] do not appear to be particularly effective. This is largely owing to a lack of personnel assigned to such functions. Fortunately, the draft Nuclear Control and Administration Act goes into some detail in setting up an inspection system for nuclear facilities and vehicles, and in delineating the powers and duties of inspectors.[100]

Another fairly common problem is the all-or-nothing approach in giving agencies the powers to impose sanctions. Thus, licensing bodies are often given only the power to withdraw a regulated party's licence, instead of being given various sanctioning powers that would include the capacity to inflict minor or major monetary fines as well. We recommend that:

> 3.11 *more attention should be paid to giving administrative authorities sanctioning powers appropriate to their mandates.*

The Commission has long been interested in sanctions relating to proceedings before administrative agencies, and we are currently in the course of preparing a separate Working Paper on the subject.

8. *Need for a Monitoring Body*

The machinery of federal government is of such importance and is of sufficiently large scale that it would be worthwhile to designate a monitoring body with responsibility to check for consistency in the structure, powers and procedures of statutory authorities as well as the mix of their powers and procedures, for the proper performance of their work. For example, a cross-checking of the tasks and powers of the Canada Labour Relations Board and the Public Service Staff Relations Board could have led to the conclusion that, if the recent amendment to the *Canada Labour Code* limiting the jurisdiction of the Federal Court over the CLRB[101] was

warranted, similar limitations should also have been imposed respecting the PSSRB. A monitoring body probably would have been cognizant of this.

As will be seen with more particularity later, we think a specialist administrative law body should be created to advise federal statutory authorities on the designing of administrative procedures and practices, and also advise the government on draft legislation and statutory instruments relating to such authorities. Such bodies have been created in countries with common law backgrounds similar to our own, for example, the United Kingdom, the United States, and Australia. This body should be given the power to advise legislative drafters during the initial preparation of enabling legislation for independent statutory authorities. Details on this proposal are discussed in Chapter Nine.

9. *Statutory Interpretation: A Public Law Perspective*

The major legal values underlying organized public sector activity should not only be articulated in a rationally structured manner through legislation but also be implemented effectively through appropriate statutory interpretation. Unfortunately, the lack of development of methods of statutory interpretation oriented towards the needs of public administration, to which the courts or other review bodies might refer in choosing approaches to interpreting enabling Acts of administrative authorities, has to date undermined the effectiveness of legislation as a dominant source of administrative law.

Fortunately, in practice, the Federal Court has exercised its virtually exclusive jurisdiction to judicially review the actions of federal administrative authorities in such a manner as to take into account the unique aspects of each statutory authority's enabling legislation. However, in order to provide individualized justice in each specific case, the courts apply the common law principles of natural justice in tandem with the statute law to the particular fact situation in which an agency has acted. Recently, the Supreme Court has adopted

the even more flexible common law duty to act fairly in reviewing administrative action.[102] If legislation is to be paramount in structuring the machinery of government, it is essential that government, the bench, the bar and faculties of law encourage the doctrinal development of methods of statutory interpretation appropriate to the underlying principles of public administration, while taking into account broader values of legality and due process. According to the particular circumstances concerned and the interests and values at stake, legal decision-making authorities could assign differing weights to various sources of law in play.

B. Retaining Parliamentary Supremacy over Agency Legislation

Once statutory administrative law has been approved by Parliament and implemented, it must be properly channelled in its application and kept up-to-date to remain appropriate and effective. Major administrative policies are developed by independent agencies, their responsible Ministers or the Governor in Council. If the pre-eminence of the enabling Act is to be maintained, Parliament should be apprised of such developments and retain an effective review function concerning agency law and activities.

1. *Parliament's Role Generally*

Parliament should take an active interest in delineating appropriate statutory mandates for independent agencies, and in reviewing administrative activities and delegated legislation, to ensure that those agencies are performing effectively and within the terms of their mandates. Although Cabinet has the power and duty to manage the government, as was said in the Report of the (Lambert) Royal Commission on Financial Management and Accountability:

> . . .Parliament's responsibility, which is of no less importance, is the continuous scrutiny that it is empowered to maintain over the Government's implementation of the measures to which Parliament has given assent.[103]

Government priorities and plans may be debated and challenged. The machinery of government as designed and operated may be scrutinized to see whether it is pursuing appropriate goals, how successful it has been in doing so, and at what cost. Needless to emphasize, however, Parliamentary review ought not to cause administrative authorities to be expending and diverting their energies too much in justifying their performance. A balance is needed. Constant review could defeat getting on with the job.

The degree of Parliamentary control over independent agencies depends, of course, on prevalent attitudes regarding their place in the machinery of government and the degree of independence particular agencies should have. If an agency is conceived as simply another administrative authority accountable through its responsible minister to Parliament and controlled by the government of the day, then the effective allocation of legislative power is different from that of an agency which is perceived as operating under a fourth head of government power with an original mandate given by statute, whose policy directions are limited for the most part only by its own professional norms or by the threat of judicial review.

For truly independent agencies, it is imperative to the maintenance of a system of Parliamentary sovereignty that legislative controls be placed over their mandates. Therefore, we recommend that:

> 3.12 *when an independent agency is established, its policy mandate or guidelines should, in principle, be stated clearly in its enabling Act.*

If for some reason a vague mandate is initially given, then as delegated legislation or policy is elaborated by an agency, interested citizens or their elected officials, in our democratic tradition, should have the opportunity to be involved in or to comment on such developments. We also recommend that:

3.13 *when an agency has appropriately articulated a once vague mandate, it should be inserted into the enabling Act.*

This requires, of course, Parliamentary action.

Parliament can play the important role of scrutinizing how the legislative mandates of statutory administrative authorities have been rendered operational, and of providing a forum or a foil for recommendations about how the mandates or operations of existing authorities might be improved or government organization altered. The keys to strengthening this role are the augmenting of requirements to report or refer matters to Parliament, and the strengthening of the Parliamentary committee system. The latter point has been dealt with in some detail in the recommendations of the Lambert Commission. Another reform that both we and the Lambert Commission recommend is that:

3.14 *if the Governor in Council, pursuant to the Public Service Rearrangement and Transfer of Duties Act, transfers administrative powers or duties from a statutory agency to a department or other agency of government, Parliamentary approval should be required.*

Because independent statutory agencies are given their mandates directly by Parliament and not through responsible ministers as intermediaries, it is recommended that:

3.15 *independent agencies prepare detailed annual reports which should be automatically and permanently referred to the appropriate standing committees of the House of Commons and subjected to close scrutiny there.*

Unfortunately, the lack of adequate staffing for, and the frequently shifting membership of Parliamentary committees to date, have combined with other factors to undermine the potential effectiveness of the process of scrutinizing reports of administrative bodies.

Annual reports should contain detailed statements of short and long term goals, and an indication of the criteria to be used by the agency to assess its success in attaining those

goals. Annual Reports should also spell out how the general legislative mandate has been "operationalized" and express what the legislative mandate has come to mean in practice. This would include an assessment of agency decisions, orders, regulations, guidelines, policy statements, directives, staff training manuals, and so forth in terms of their contribution to the elaboration of the formal statutory mandate. Where general legislative terms have been made specific through agency decisions or regulations, the report should make a recommendation concerning whether or not the legislation should be amended to reflect such development. As well, each annual report should include an appendix listing all delegated legislation passed pertaining to its activities and indicating the policies relating to them.

To ensure that annual reports are adequately scrutinized, the Commission recommends that:

> 3.16 *Parliamentary Standing Committees to which annual reports of independent agencies are referred should be strengthened. Each Committee should be allowed its own operational budget, part of which should be used to pay for permanent research staff adequate in size for the committee to scrutinize administration effectively, and in appropriate cases, conduct additional research on administrative operations.*

The relationship between independent agencies and Parliament is the subject of a separate Law Reform Commission study paper,[104] from which we hope to develop more precise recommendations concerning Parliamentary scrutiny.

2. *Scrutiny of Delegated Legislation*

One very important step was taken by Parliament in the 1970's with respect to scrutinizing statutory administrative law. The Standing Joint Committee of the Senate and of the House of Commons on Regulations and Other Statutory Instruments was created to scrutinize delegated legislation pursuant to the *Statutory Instruments Act*.[105] Only a small part of

delegated legislation relates, of course, to independent agencies; the bulk of it covers the activities of departmental authorities.

The Act requires regulation-making authorities to forward three copies of any proposed regulation to the Clerk of the Privy Council, who, in consultation with the Deputy Minister of Justice, is to scrutinize the regulation to ensure that:

(a) it is authorized by the statute pursuant to which it is to be made;

(b) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;

(c) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Bill of Rights*; and

(d) the form and draftsmanship of the proposed regulation are in accordance with established standards.[106]

In fact, whenever government authorities are not sure whether a draft instrument is a regulation or not, they immediately send the instrument to the Director of Privy Council Services at the Department of Justice for legal scrutiny. There it is determined whether the proposed instrument would constitute a regulation if it were issued, made or published, and whether it falls within the criteria noted. If these criteria are not met, the regulation-making authority is informed of the drafting changes required to make the instruments conform to them.

In the course of scrutinizing these instruments, the lawyers of Privy Council Services frequently communicate with the officials who prepared them. Since regulations are to an increasing degree being drafted by non-lawyers, the great majority of them initially have drafting or legal defects. Privy Council Services consistently offers advice to regulation-making authorities. Officials who have prepared draft regulations are also apprised of potential problems they might face with regard to criteria used by the Standing Joint Committee

of the Senate and House of Commons on Regulations and other Statutory Instruments in reviewing such instruments.

The average time taken by Privy Council Services to scrutinize a proposed regulation and get it in shape for registration with the Clerk of the Privy Council is twenty-one days. The Privy Council Services lawyers are often put under considerable pressure to expedite this process. Consequently, they do not have much opportunity to encourage the drafting of uniform provisions to be used by statutory authorities performing similar functions, such as independent administrative agencies conducting similar types of proceedings.

Most regulations are cleared through Privy Council Services, and are then sent within seven days to the Assistant Clerk of the Privy Council for registration. They are then published in the *Canada Gazette*[107] within twenty-three days following registration. Most regulations go into effect as of the date of registration, but except in special circumstances, no person is to be convicted of an offence of contravening a regulation unless at the time of the contravention it was published in the *Canada Gazette* in both official languages.

Under section 27 of the *Statutory Instruments Act*,[108] the Governor in Council may make regulations exempting certain regulations or classes of regulations from examination by the Deputy Minister of Justice, registration with the Clerk of the Privy Council, or publication. Among the regulations exempted are the following:

(1) regulations of a class that is so large in volume that it would be impractical to register them all;

(2) regulations affecting or likely to affect only a limited number of persons (in which case reasonable steps are to be taken for the purpose of bringing them to the notice of those persons); and

(3) regulations which in the interest of international relations, national defence or security, or federal-provincial relations should not be published.

In practice, the lawyers of Privy Council Services scrutinize certain regulations which may be registered but not published, but none which are exempted from registration.

Under section 26 of the Act, every statutory instrument made after the coming into force of the Act, other than regulations exempted under paragraph 27(*d*), stands permanently referred to the Standing Joint Committee of the Senate and the House of Commons on Regulations and Other Statutory Instruments. Paragraph 27(*d*) exempts from Parliamentary scrutiny such regulations or other statutory instruments about which "the Governor in Council is satisfied that in the interest of international relations, national defence or security or federal-provincial relations the inspecting thereof and the obtaining of copies thereof should be precluded", or statutory instruments which, if not precluded from inspection, would "result or be likely to result in injustice or undue hardship to any person or body affected thereby or in serious and unwarranted detriment to any such person or body in the matter or conduct of his or its affairs".

To the extent that not even an exempting order has to be tabled before Parliament by the Governor in Council to prevent Parliamentary scrutiny of regulations falling under the terms of paragraph 27(*d*), the *Statutory Instruments Act*[109] represents a retrograde step from its predecessor, the *Regulations Act*.[110] However, the old Act covered only regulations of a clearly legislative nature, and there was then no Parliamentary Committee to scrutinize delegated legislation.

In practice, the scope of Parliamentary scrutiny of statutory instruments by the Joint Committee is limited. The term "statutory instrument" is specially defined under paragraph 2(1)(*d*) of the *Statutory Instruments Act*,[111] and is honeycombed with exceptions. Furthermore, the Department of Justice lawyers in Privy Council Services have given a narrow interpretation to the term. In their view, only those writings made as a result of an express statutory provision calling for a particular kind of written instrument are statutory instruments. Thus, if a section in a statute reads — "The Minister may by licence authorize (some activity)" — the licence is a statutory

instrument; but if the section says — "The Minister may authorize or permit" — then any written document used to implement the authorization, even if it takes the form of a licence, is not a statutory instrument.

In 1977 the Joint Committee tabled its Second Report in the Second Session of the 30th Parliament, in which it contested this narrow definition in these words:

> 1. It [the Committee] considers that subparagraph 2(1)(*d*)(i) of the *Statutory Instruments Act* is not as narrowly confined in its application to documents issued pursuant to statutory authority as the opinion of the Department of Justice would have it. In particular, it considers that subparagraph 2(1)(*d*)(i) does not exclude instruments made under statutory grants of subordinate law making power which do not contain a magic formula such as 'by tariff', etc. That is to say, it does include instruments made under statutory powers which authorize their issuing, making or establishment whether by proper title or in general terms by conferring subordinate law making power without specifying the name of the document in which that exercise of subordinate law making power is to be embodied . . . What is important is what is issued, made or established and whether it is issued, made or established pursuant to statutory authority, not whether it is by specific title ordered or authorized to be issued, etc.[112]

The Law Reform Commission agrees in principle with the Joint Committee that, from a substantive point of view, the nature of an instrument rather than its label should determine whether it is a statutory instrument or not. Subparagraph 2(1)(*d*)(i) of the *Statutory Instruments Act* presumably would be given a broader interpretation if instead of saying

> "(*d*) 'statutory instrument' means any . . . instrument issued, made or established
>
> (i) in the execution of a power conferred by or under an Act of Parliament, by or under which such instru-

ment *is expressly authorized to be* issued, made or established . . ."

the italicized words "is expressly authorized to be" were replaced by the words "may be".[113] However, the greater volume of work which such a revised definition of statutory instrument would impose upon Privy Council Services and the Registry in the Privy Council Office, not to speak of the increased burden on the Joint Committee to scrutinize the larger number of instruments referred to it, might cause enormous practical problems. The whole matter is one which deserves further consultation between the Joint Committee, the Privy Council Office and the Department of Justice.

However, there exists at present a practical problem that could be immediately solved without much difficulty. Although the *Statutory Instruments Act* directs that all statutory instruments shall stand permanently referred to the Joint Committee,[114] no mechanism is provided for their transmission to it. Consequently, apart from learning informally about certain statutory instruments through the good offices of a handful of sympathetic departments or agencies, committee counsel seeking to examine statutory instruments before bringing ones of questionable quality to the attention of committee members, have to focus mainly on instruments published in the *Canada Gazette*.

But the Act directs only that registered regulations must be published. Other statutory instruments are not published except where the Governor in Council by regulation so directs, or where the Act authorizes the Clerk of the Privy Council to direct such publication as the Clerk deems to be in the public interest. Under the present circumstances, it is not surprising that the Joint Committee does not scrutinize many statutory instruments other than published regulations. At a minimum, we recommend that:

3.17 *the Statutory Instruments Act should be amended to require the Clerk of the Privy Council to make available on a regular basis to the Joint Committee the lists and summaries of all statutory instruments to be registered with the Privy Council which are placed on the weekly*

agenda of the Cabinet committee responsible for statutory instruments. Such listed instruments as the Joint Committee expressed an interest in examining should then be made available to it, but Committee members should undertake not to make public the contents of instruments exempted from inspection under section 27 of the Act.

A study could also be conducted by the Government into whether it would be practical to require regulation-making authorities to send certain classes of statutory instruments directly to the Joint Committee upon their coming into effect.

The two legal counsel for the Joint Committee constantly monitor the *Canada Gazette* and scrutinize the statutory instruments there published or otherwise brought to their attention by government officials. They give special attention to statutory instruments having a high social policy content as opposed to those which are mainly technical or scientific. The problem of *vires* or legality frequently arises in the context of instruments which subdelegate a power or give a power of dispensation.

Counsel often contact departmental or agency officials for clarification or explanation of terms of statutory instruments. Only instruments to which counsel eventually takes objection are seen by the Joint Committee. When an instrument is put on the agenda for consideration, committee members receive copies of the instrument, comments of committee counsel, and copies of any relevant correspondence. The Committee usually directs counsel to engage in any further correspondence necessary to proffer the Committee's formal objections to the relevant authority.

Most departments and agencies have been cooperative and willing to comply with changes suggested by the Joint Committee. Some, however, have been characterized by committee counsel as intransigent. Where it is felt that an inadequate response has been made by an authority, the matter may be taken up informally by one of the Joint Chairmen, or another member of the Joint Committee, with the appropriate Minister. If no satisfactory action is taken, the Commit-

tee's only recourse is to report to the two chambers of Parliament. However, such a report is rare. Where the Committee has reported, the reports have been adopted by each chamber — but that is as far as the chambers can go. The House of Commons has no standing orders, nor the Senate any rules providing for the disallowance of statutory instruments. Thus, when Parliament delegates a power, it cannot police its exercise except by means of new legislation.

Very few statutes provide for statutory instruments to be subject to either affirmative or negative resolution procedures, thereby allowing either or both of the Houses of Parliament to control the coming into force of an instrument or to disallow it. Section 28.1 of the *Interpretation Act*,[115] added by subsection 1(3) of the *Statutory Instruments Consequential Amendments Act*,[116] gives standard definitions to the terms "subject to affirmative resolution" and "subject to negative resolution" of Parliament or of the House of Commons, but does not detail the necessary procedural steps.

The Joint Committee regards the extension of such procedures as desirable, and considers that they might be more widely adopted in the drafting of Bills if there were a statutory codification of the requisites for affirmative and negative resolutions so that there would be a clear understanding of the procedures to be followed, and so forth. It has recommended either that the *Interpretation Act*[117] be amended to embody a complete code of procedure, or the House of Commons and the Senate, building on section 28.1 could adopt Standing Orders and Rules (preferably identical), respectively, setting forth detailed procedures.[118]

A decade ago the Special Committee of the House of Commons on Statutory Instruments (the MacGuigan Committee), in its Third Report, gave a considered opinion on appropriate Parliamentary action respecting regulations. After referring to the comparative practices respecting Parliamentary supervision of delegated legislation in various jurisdictions of the Commonwealth, and quoting the critical views of the McRuer Report in Ontario concerning the use of affirmative or negative resolutions by the Legislature to control regulation-

making powers, the Special Committee recommended that normally Parliament should exercise its power of review by a resolution that a questionable statutory instrument be referred to the government for reconsideration.[119]

The Special Committee recognized, however, that in particular cases where more stringent controls were called for, such as where regulations put "meat" on a statutory skeleton in new areas of governmental activity affecting matters of consequence to the public, provision for affirmative or negative resolutions might be desirable.[120] It also said that further consideration should be given to providing in the Standing Orders for any group of at least ten members to have the right to require a short debate on a particular regulation provided that this did not interfere with the progress of government business.[121] Taking into account the Report of the Committee and the Law Reform Commission's own research, we recommend that:

> 3.18 *provision should be made in the Standing Orders of the House and the Rules of the Senate for debate on questionable statutory instruments at the request of at least ten members of the particular Chamber within a limited delay period, and for the making of resolutions to refer statutory instruments to the responsible Minister for reconsideration;* and
>
> 3.19 *detailed provisions should be set out regarding the procedures to be followed in the House and Senate to carry out affirmative or negative resolutions regarding statutory instruments.*

CHAPTER FOUR

Executive Controls over Agencies

The delegation of broad discretion to independent administrative agencies raises interesting questions about the relation they have with the government. Our political traditions stress that power and responsibility should be placed in elected officials. In the absence of clear justification, governmental authority should not be exercised by non-elected officials unless some basis for responsiveness and accountability to the Cabinet and Parliament is retained. The need for some means of increasing accountability to Parliament having been treated already, we discuss here various Ministerial controls exercised over independent agencies.

The controls which the government puts in place to help guide the actions of an agency should depend on the following factors: first, the overall governmental scheme in which the agency operates, including the nature and range of powers conferred on it and the nature of the rights its action affects; second, the stages in the administrative process at which the interaction between Ministers and agencies concerning the use of discretionary policy-oriented powers by agencies should be taken into account, including the stage of elaboration and application of policy, and enforcement and review of policy decisions; and third, the degree of Ministerial control considered desirable at any or all of these stages.

By conscious planning, inconsistent or conflicting allocations of government policy-making authority can be minimized. We recommend that:

> 4.1 *to avoid unnecessary confusion regarding the sources of policy direction for an agency, its enabling Act should contain provisions chosen with a conscious view to the degree to which the agency should be provided with political insulation or Ministerial control at different stages of the administrative process.*

A. Ministerial Control Versus Independence

Because our constitutional traditions stress the importance of retaining administrators under the supervision of responsible Ministers, we recommend that:

> 4.2 *the presumption should operate, in structuring the machinery of government, that administrative authorities be established within departmental confines unless there are very good reasons for constituting them as independent agencies.*

This approach should be all the more favoured since the public service has become professionalized.

However, a strong reason to retain a wide range of independent agencies, at least for the near future, is that departmental units still operate for the most part as closed forums where confidentiality reigns and little opportunity is given interested persons to submit their views on programs or policies to compete in an open forum on a merit basis. Particularly in those sectors where there are strong vested interests employing professional lobbyists, whose activities can have an immense effect on variegated lesser interests, it is important to give the latter some opportunity for representation in the policy-making process. The matter of public participation in policy-making is dealt with in some detail in the next chapter.

The classic example of the valid placing of governmental responsibility in non-elected persons is found in our judicial system. Judges are, in a sense, part of the governmental process, yet they are appointed. They apply the law in individual cases and, by convention as well as the many checks and balances which control judicial institutions, generally play only a limited role in shaping policy. Most people would agree that there is a need for decision makers who are capable of giving impartial thought to individual cases and, if necessary, of putting a check on abuse of power by those more directly involved in the exercise of political power. They should not be influenced by, or serve the perceived partisan political needs of, the government of the day but should provide an element of stability to the body politic and its legal processes. By analogy, it is believed that a considerable degree of independence from governmental control is needed where an agency is performing a court-like function. Indeed, we recommend that:

> 4.3 *agencies performing solely a court-like function should be kept free from governmental interference.*

To make them controllable by directions from the government would detract considerably from the integrity of their operations.

Between the cases where administrative authorities should clearly fall within departmental structures or be entirely insulated from Ministerial controls, however, there remains a large spectrum of agencies about which, as the McLean Commission pointed out at the turn of the century, great care must be taken in determining their powers and the means of supervision, direction or control of them to retain in Ministerial hands. A Commission study paper on *Political Controls over Independent Agencies* classifies model types of relationships between Ministers and agencies along this spectrum according to the nature of Ministerial control over policy elaboration and application by agencies, and Ministerial review of agency activities.[122]

Policy elaboration involves the translation of general policy criteria as set forth by statute into regulations and other

rules and guidelines. A Minister or the Governor in Council may be formally involved at this level where he has the power to make or approve regulations or to issue directives. Less formal intervention may occur through consultations between departmental and agency officials, the issuance of governmental policy statements for an agency to take into account, Ministerial representations relating to particular proceedings before an agency, and so forth.

Policy application consists of adjudication or other decision-making requiring the interpretation and application of policy within the framework of the statute. The role of elected officials here might entail considering and approving tentative agency decisions or reaching decisions in individual cases based on findings by an agency whose role it is to make recommendations.

Modes of Ministerial review include appeals or petitions for review to a Minister or the Governor in Council, or review by a Minister or the Governor in Council of recommendations on the basis of which he comes to a final determination. Executive review does not, of course, necessarily constitute the final administrative step; there are statutes under which the executive can refer a matter back to an agency for reconsideration.

B. Classification of Agencies by Ministerial Control Mechanisms

The agencies most closely controlled by the government are those explicitly designated as agencies of the Crown or put under the direction and control of a Minister or the Governor in Council. The Atomic Energy Control Board is an example. The next most controlled are those operated effectively as agencies of the Crown because, even if they appear to act more independently, not only must their regulations be

approved by elected officials, but their important decisions are subject to such approval as well. The National Energy Board is an example.

Types of agencies falling in the middle of the spectrum are: those which make independent public decisions or recommendations that the government has to take into account, but that are not binding on it; agencies whose regulations must be made or approved by elected officials and whose decisions may be reviewed by or appealed to the executive but whose decisions are independently arrived at; and agencies having limited mandates in an overall legislative scheme where initial decision-making takes place within a department and the agencies get involved at a later stage as advisory or appellate bodies (those independent court-like agencies treating cases arising from departmental decision-making would thus be listed again here).

Agencies of the most independent type are those before which decision-making on particular issues originates and which make their own regulations and decisions without being subjected to government approval. Two of these are the Canadian Transport Commission and the Canadian Radio-television and Telecommunications Commission. The CRTC makes all, and the CTC makes part of its regulations without Ministerial approval. Both agencies arrive at their own independent decisions, although these are subject to review by the Cabinet and the Federal Court.

There has been little demand for law reform concerning Ministerial controls over certain agencies. Agencies with a high volume of detailed work with no one decision being of great significance to the government of the day, such as welfare benefits agencies, and agencies with narrow mandates or operating only at a particular level of the administrative process as one of a sequence of authorities dealing with an issue, such as the Anti-dumping Tribunal, have not generally been subjects of concern in terms of political control.

Considerable debate has taken place, however, about the governmental role of agencies given the combined functions of

elaborating and applying policy, and about the scope and degree of Ministerial controls to be exercised over them. When Parliament asks the National Energy Board to decide whether an application to build a pipeline is consistent with "present and future public convenience and necessity" it is asking the Board to develop policy related to that question. The Air Transport Committee of the Canadian Transport Commission cannot approve an application for a new service route without making policy decisions about transportation networks already in existence. While regulators are sometimes reluctant to acknowledge this policy role, it unquestionably exists.

This situation did not develop accidentally. As was mentioned earlier, agencies have sometimes been created where it was felt desirable to "de-politicize" an issue. The concept of Ministerial responsibility allows for a high level of visibility for the work of the government, and one of the major reasons for creating the so-called independent agencies was the need to relieve Ministers from the burden of accounting publicly for policy choices in administrative decision-making, especially in sensitive areas such as issuing licences to enterprises wishing to operate in regulated sectors of the economy. Another reason was to make sure that Parliament generally focussed its attention on matters of policy and general principle rather than expending a great deal of time on criticizing agency decisions in individual cases.

C. Extending Controls over Regulatory Agencies

But recently, more and more politicians and political theorists have been encouraging the government to assert more control over important policy issues. We are now seeing evidence of a growing desire on the part of the Cabinet and individual Ministers to exercise more influence, especially over agencies with regulatory functions. Some government departments have expanded their interest in policy-making

related to matters closely aligned with the responsibilities exercised by agencies. This has been a source of increasing tension between departments and regulatory agencies having similar policy interests and sharing the same responsible Minister.

Although the National Energy Board, for example, was originally established to fill a void in government policy-making, since the creation of the Department of Energy, Mines and Resources in 1966 with advisory functions substantially overlapping those of the Board, questions have been raised concerning what should be the working relationship between the two bodies. The Board has also been forced to contend with other departmental influences such as those of the Department of Indian and Northern Affairs and the Department of the Environment, both with policy-making roles which may focus on objectives different from those of the Board.

The Canadian Transport Commission provides another example. When it was established in 1967 it was envisaged as the focal point for a complex scheme of regulation of several modes of transportation formerly regulated by three separate bodies. Difficult problems have ensued in the fulfilment of this scheme, and over the past several years the Ministry of Transport has assumed more and more control over policy planning. In a speech to Parliament in June, 1975, the Minister stated that the Act would be amended to ensure that the principal source of transportation policy advice for the government would be the Minister, not the CTC.[123] Although several draft bills have since been tabled before Parliament, none has been enacted and debates continue about how increased Ministerial involvement should be implemented. Similar problems pervade the relationship between the Canadian Radio-television and Telecommunications Commission and the Department of Communications, and here too draft legislation has been tabled.

While some departments are making strong efforts to assert their dominance in primary policy-making in certain areas of high sensitivity, this does not mean that agencies will be

relieved of all policy-making functions. Even if, for example, the main policy-making thrust on issues currently enjoying a high profile passes from the CTC to the Ministry of Transport, or from the CRTC to the Ministry of Communications, both regulatory agencies will continue to develop policies governing applications made before them. The fact that the National Energy Board must compete with other bodies in the development of an increasingly complex energy policy does not detract from the fact that it must continue to decide applications in a way which is consistent with its perceptions of energy problems in Canada and worldwide. It does mean, however, that agency policy will have to be coordinated with government policy and that there will be considerable interest in the controls to be made available to government to ensure that broad lines of agency decision-making do not fly in the face of Cabinet policy.

D. Methods of Political Control

In saying this we do not mean to convey the impression that this is a new problem, or that government has heretofore been uninterested in, and incapable of controlling, agency performance. There are presently several formal and informal methods which can be, and are, used to influence agency policies. Some of these are Parliamentary controls, while others are clearly Cabinet or Ministerial controls. But because of the high degree of influence exerted by Cabinet over Parliament, the distinction between parliamentary control and government control is not always meaningful. Parliament, of course, always retains the power to repeal a delegation of authority or to superimpose legislative guidelines defining its scope, and this avenue is generally open to the government to control what agencies do. It is, however, a cumbersome and time-consuming way to react. More effective action could be taken by Parliament respecting the scrutiny of, debate on, and making of affirmative or negative resolutions concerning statutory instruments, however, as was pointed out in Chapter Three. The fuller use of reports to Parliament to allow for

periodic reconsideration of agency mandates and operations was also mentioned there.

Attempts at Ministerial control external to the administrative process can also be made. Influence of a sort can be exerted through appointments to agencies, but new appointees usually absorb the professional norms of an agency rather quickly. Control of another sort can be more easily exercised through budgetary planning, under which programs are scrutinized and approved; in effect, conditions may be placed on agency funding, although Treasury Board officials generally agree that policy direction over particular governmental bodies or programs should not be seen to be a function of financial management officials. We do not think that either budgetary planning or the way of making appointments should be distorted to achieve ends better met through issuance of clear government directions or policy statements.

In connection with the administrative process itself, Ministerial intervention can occur at the stages of policy elaboration, policy application, or governmental review of administrative action. The framework for an agency's policies is often elaborated through regulations, and most agency legislation also allows a particular Minister or, more usually, the Governor in Council to pass regulations expanding on the framework of a legislative scheme. Where agencies themselves are given this authority, the regulations of most of them become effective only on approval by a Minister or the Governor in Council, the two major exceptions being the Canadian Transport Commission and the Canadian Radio-television and Telecommunications Commission.

In some cases, Ministers or the Cabinet are given authority to issue directions to an agency. Section 27 of the *Broadcasting Act*,[124] for example, authorizes the Governor in Council to issue directions to the Canadian Radio-television and Telecommunications Commission on limited matters, including the maximum number of channels to be licensed within a geographical area, the reservation of channels for Canadian Broadcasting Corporation use, and the classes of applicants to whom licences may not be issued. Similarly, section 7 of the

Atomic Energy Control Act[125] requires that the AECB must comply with any general or specific direction of the Minister.

Controls over delegated legislation or powers to issue directions are designed primarily to exercise broad supervisory authority over an agency. However, other powers are given to permit governments to intercede in particular cases and influence the application of policy there. Ministers, departments or other agencies might intervene in proceedings before an agency to make representations. Decisions of the National Energy Board to issue certificates of public convenience and necessity for major projects like pipelines require Cabinet approval. The expropriation of a particular piece of land, for example, requires ministerial approval.

At the stage of political review of agency decision-making, Cabinet or an individual Minister may act to control policy application and, indirectly, policy elaboration. Modes of political review include appeals or petitions for review to a Minister or the Governor in Council. Political review decisions may result in the accepting, varying or the setting aside of agency decisions in their being referred back to the agencies.

Apart from these formal methods of Ministerial control, there are informal ones as well. *Ex parte* communications may be made from Ministers to agencies concerning matters of general policy or individual cases. Government departments, or Ministers, will sometimes issue policy statements or make speeches which may have an impact on agencies even though they have no formal status. Less formal, but equally or more important, are the personal contacts through agency participation in meetings and conferences or on task forces, in which clearly expressed and generally agreed upon policy preferences may become highly influential on future agency decisions.

We recognize that government control over many administrative agencies, notably those with major policy functions, may be necessary under our governmental system and that there are many considerations which have to be weighted in selecting a particular mechanism for controlling a particular

agency function. These are largely political questions which must be weighed by the government when agency legislation is in the planning stages and, ultimately, by Parliament as legislator. It is our role, however, to study the impact of the exercise of these controls on the administrative process and how they affect the integrity of the process, as well as to make general observations about the nature of some of the controls to which we have referred.

E. Control over Delegated Legislation

At the level of policy elaboration linked more or less directly to an agency's statutory mandate, delegated legislation can be extremely important, as was mentioned in Chapter Three. The regulations for most agencies are either made or approved by the responsible Minister or the Governor in Council. However, the Canadian Radio-television and Telecommunications Commission, and to a large extent, the Canadian Transport Commission, make their own regulations without ministerial control. The Lambert Commission has recommended that in cases where independent agencies are authorized to make regulations, these be subject to Governor in Council approval before being promulgated.[126] In support of their position they cite the Third Report of the Special (MacGuigan) Committee on Statutory Instruments, 1968-69:

> The government of the day should be fully responsible to Parliament, and through it to the people, for all subordinate laws which are made, whether or not the policy embodied therein was initiated within the existing departmental structure or elsewhere.[127]

Nevertheless, even recent draft legislation amending the enabling legislation of the CTC and the CRTC, does not propose any changes on this score. A degree of competition over subject-matter jurisdiction can be a healthy thing. For example, the CRTC has set high standards for any other body to meet in the field of broadcasting policy. However, we recommend that:

4.4 *there should be some direct line of accountability to elected officials for all delegated legislation; where an agency is given the power to make its own regulations without government direction or approval, those regulations should be made subject to affirmative or negative resolution by Parliament.*

Delegated legislation and agency policy can, of course, always be scrutinized in the context of review by Parliamentary standing committees of annual reports from statutory authorities.

F. Directive Power

There are occasions when it is important for the government of the day to give some direction to general policy mandates of administrative authorities. Although the step of legislative amendment is the only appropriate one when a statutory authority's basic mandate is being changed, Parliamentary resources should be used judiciously. Often enough, government officials can reorient administrative activity by making glosses on existing legislation. The device of the ministerial directive power based on a particular statutory mandate has been developed to meet the need for changes in policy direction in such circumstances. As mentioned previously, limited directive powers over the CRTC and the Atomic Energy Control Board have already been granted to the responsible Ministers.

We favour a more open enunciation of government policy than has sometimes been the case in the past and recommend that:

4.5 *if there is to be Ministerial control over agency decision-making, it should in principle be done on a general policy level in advance of specific cases.*

Directions serve as devices for policy control which can be subjected to scrutiny at the time a particular issue is up for determination before an agency. We recommend that:

4.6 *the power to issue directions should be used, but sparingly and not as a general political control device, in giving policy direction over well-defined areas of activity to agencies having relatively broad mandates to elaborate and apply policy.*

Thus, the directive power is particularly suitable for guiding the policies of independent regulatory agencies.

However, the way in which directions are presently made lacks the degree of openness provided by the legislative process, which gives public exposure to government policy and an opportunity to interested persons to make representations. Ideally, a policy-making process should offer some means by which policy positions can be aired prior to becoming effective, so that interested persons may have an opportunity to participate in policy making.

From a governmental standpoint, directions offer the advantage of being less formal modes of policy communication than regulations; but the greater the freedom from parliamentary constraints, the greater is the risk of executive policies not reflecting values based in the representative process found in our parliamentary system of government. There is no requirement, for example, that the directions made under the *Atomic Energy Control Act*[128] even be tabled in Parliament, although they can obviously be brought to Parliament's attention by other means. We think that to be fair to the agencies, Parliament and the general public, there need to be improvements made in the process of issuing directions. We endorse the recommendation of the Lambert Commission that:

4.7 *prior to the issuance of a policy direction to an independent agency, the Government should refer the matter to the agency, which may request public submissions thereon and shall make a public report within ninety days or such longer period as the Government may specify, and further, such directions should be published in the Canada Gazette and tabled in the House of Commons.*

Research done both for the Law Reform Commission and the Lambert Commission supports this recommendation. We further recommend that:

4.8 *in order to provide for the possibility of Parliamentary control over directions, Parliament should retain a power to pass a negative resolution within seven days after a direction is issued.*

To further the public interest as perceived by the government of the day, where the Cabinet is first apprised of the political importance of agency proceedings after they have commenced, we recommend that:

4.9 *the Governor in Council should have the power to issue a "stop order", effectively halting agency proceedings for a period of up to ninety days, in order that an appropriate general direction might be issued for the agency to consider in arriving at a final decision.*

We also recommend that:

4.10 *in order that agencies to which directions have been issued might benefit from further clarification of the meaning of directions, they should have the power to refer them back to the issuing authority for interpretation. Such interpretation should then be issued within thirty days.*

G. Ministerial Approval

At the level of policy application through agency decision-making, the general requirement of Ministerial approval for many types of agency action may have its place. There are sufficient numbers of ministries and high-level departmental advisory support officials in existence that this political control device could be used even more than at present before stretching to their limits the capacity of ministries to cope with them. However, demands for approval by the Cabinet on a widespread basis would place a great burden on the Privy Council Office and on the Cabinet itself. The Law Reform Commission recommends that:

4.11 *an arrangement such as that made under the National Energy Board Act regarding the issuance of certificates in respect of a pipeline or international power line, requiring the Governor in Council to consider for approval every decision of a regulatory agency pertaining to a particular field of endeavour, should not be adopted as a model political control device.*

H. Political Review of Administrative Action

While there is no evidence to suggest there has been excessive resort to the political review mechanism by the government itself, there has been a substantial increase in the number of petitions to review to the Governor in Council (Cabinet appeals) launched in the past few years pursuant to subsection 64(1) of the *National Transportation Act*[129] by parties to transport hearings before the CTC and telecommunications hearings before the CRTC.[130] The very existence of such a mechanism creates doubt in the minds of persons involved in administrative proceedings as to the choice of the appropriate body to which to direct applications and arguments for final decision, and as to what procedures or tactics to follow.

Although appeals to courts are grounded on accepted standards and restricted to matters of record or, occasionally, clearly enunciated new material, Cabinet "appeals" are quite different. They are really policy appeals replete with lobbying external to any formal written representations made, and allow for reversal on grounds of "evidence" unrelated to the considerations an agency may have regarded as relevant. Such review may have a detrimental effect on agencies and detract from the integrity of the administrative process in the eyes of those who are parties to proceedings before agencies. To be reversed on such an appeal can be demoralizing and can contribute to a less than conscientious approach to agency responsibilities. This is particularly so when the appeal is not well documented and the reasons obscure.

Policy appeals can also be used to change policy retroactively. An agency may have decided a case on the basis of existing policy, only to have the decision reversed on a policy newly enunciated by the Cabinet. The fact that Cabinet review proceedings are both confidential and flexible means that decisions are reversed without providing a full opportunity to participate in the decision, and without full knowledge of the basis of the decision. This can lead to public apprehension that the Cabinet has not really limited its terms of reference in policy review to the scope and intent of the statute in question, and that there has been an abuse of executive power through the taking of action contrary to the intent of Parliament. This undermines belief in the legitimacy of the government of the day. Litigation has gone up before the Supreme Court of Canada concerning whether the Cabinet acted fairly in its handling of participants in political review proceedings.[131] Rather than risk further pressures on the agencies or on the Cabinet, we recommend that:

> 4.12 *provisions for the final disposition by the Cabinet or a minister of appeals of any agency decisions except those requesting the equivalent of the exercise of the prerogative of mercy or a decision based on humanitarian grounds, should be abolished.*

While we acknowledge that governments may feel it essential to have the power to review policy in individual cases in some situations, such power should be available only in exceptional circumstances and, when it is, there should be clearly enunciated procedures, particularly for appeals. As well, where such a power of review is reserved, it would be preferable to exert it mainly to check an agency's compliance with government policies which were communicated in advance of the agency decision. It is important that both an agency and the parties appearing before it clearly understand what policies will ultimately govern the disposition of a case, whether by the agency or the government.

If any political review power of the Cabinet is to be maintained, the Governor in Council should be given authority only to set aside initial agency decisions and refer policy factors the agency might not have adequately taken into

account to the agency for reconsideration and final disposition. This device could be used to review agency functions in various statutory contexts or as a means of scrutinizing how an agency has responded to a direction by the Cabinet. It would allow for the Cabinet, when referring matters back to an agency, to indicate what aspects of its statutory mandate the government thought the agency should weigh in reconsidering its decision, while maintaining the integrity of the administrative process by allowing the agency to be the final administrative decision-maker in its own proceedings.

I. Informal Political Controls

A few observations can be made, as well, about informal methods of influencing policy. In many ways these can create even more difficult problems. Governments may be more inclined to rely on informal methods than formal ones so that some degree of control can be exercised without having to accept responsibility. Even where more formal methods are used by governments, informal influences are inevitable. Agencies are in frequent contact with departmental officials and with officials from other agencies, both on a federal and provincial level. In many ways this is highly desirable. It is important that agencies be aware of what is going on in other branches of government and have information about, and the point of view of, other agencies which may be facing a different aspect of a common problem.

Nor would it be realistic to attempt to prevent agencies with regulatory responsibility from participating in conferences and meetings dealing with the problems they encounter on a day to day basis. These interrelationships do cause difficulties, however, when they amount to a form of control through the clandestine influencing of agency decisions. Where supposedly independent agency decisions are perceived as having been manipulated by closed arrangements, the integrity of the process suffers. While the independence of agencies does not, in

our view, imply absolute freedom from political control, it does imply that the control will be exercised in an open way. This is especially important where agencies are involved in the regulation of other governmental enterprises, such as Crown corporations.

One way to combat the untoward effects of informal influence is to insist, and we so recommend, that:

> 4.13 *departments and agencies should have not only the right but the responsibility to intervene in proceedings of special interest to them before other departments or agencies and, conversely, the responsibility to hear the views of those others which seek to make representations before them. This should occur as much as possible in public proceedings.*

We further recommend that:

> 4.14 *ex parte communications to an agency from any governmental authority or other sources making representations pertaining to particular proceedings should be put on the record in the course of those proceedings.*

This is especially important in proceedings where individual claims are determined, where the parties may wish to protect their interests by addressing themselves to policies advanced by government intervenors. For example, any message such as that contained in the letter dated December 14, 1976 and marked "confidential" from the Minister of Communications, Jeanne Sauvé, to the Chairman of the CRTC, Harry Boyle, in which it was communicated that the government had "agreed that the Association of Telesat Canada with the Trans-Canada Telephone System as a member of TCTS was acceptable",[132] subject to some conditions, should be put on the record at agency proceedings or not transmitted at all.

The need is less urgent in policy-making proceedings, although even here an agency should at a minimum make clear the "information" on which it would base its decision so that alternative views to the policy biases encouraged by "off the record" deliberations with other government officials and bodies might be duly considered. Awkward situations can

easily arise, however, where a privileged Crown enterprise has filed an application competing with private enterprises, for example, in the fields of oil and gas or nuclear energy.

J. Occasional Need for Unimpeded Political Initiatives

In some situations, government decision-making through administrative agencies may be wholly inappropriate, particularly where the government is committed to a preconceived result. One example might be the application by Interprovincial Pipeline Ltd. to the National Energy Board in 1974 to extend the existing oil pipeline system from Sarnia to Montreal. This application proceeded while a task force of Board, government and industry representatives worked to expedite the building of the pipeline, which was felt by the government to be very much in the public interest. The outcome of the application could hardly have been in doubt, despite the fact that cogent objections were raised by intervenors.[133]

Another example of the same sort of difficulty can be seen in the Telesat Canada application to join the Trans-Canada Telephone System pursuant to a Proposed Agreement they had entered into in December 1976. As mentioned above, the government of the day indicated in advance that it favoured the arrangement but, following public hearings held in the Spring of 1977, the CRTC decided that the Agreement would not be in the public interest. Following a petition to review filed before the Governor in Council, the Cabinet varied the CRTC decision so as to approve the Agreement.[134] Whatever the actual merits of the Telesat case, it was a prime example of Ministerial intervention in the administrative process, from the stage prior to an application to an agency for a licence, ruling or other decision up to the stage of the Cabinet appeal itself.

Another situation in which agency decision-making faces difficulties is where matters become subjects for negotiation between the federal and provincial governments. In such situations, the federal government may feel constrained to put pressure on the regulatory agency to reach a decision which accommodates an understanding achieved between the two levels of government. In the Manitoba Cable case in 1976, cable licences which had been issued by the CRTC were set aside by the Cabinet after a federal-provincial agreement on cable matters had been reached.[135]

We do not doubt that there are instances when the government should have its way on specific issues that would otherwise be dealt with by administrative authorities in a routine manner. It would be better to allow the government to take these issues right out of the regular administrative process rather than to distort the process either through informal pressure or by overruling the agency after the process has run its course. While an agency, in these cases, could provide needed advice on technical aspects of implementing the government decision, its integrity as a decision-maker would not be compromised by its participation in a mere ritual.

Undoubtedly, a variety of techniques other than the directive power could be devised to allow the government to take the initiative. Perhaps the least controversial device for the government to use in carrying out an initiative is to introduce special legislation. For example, under the *Northern Pipeline Act*,[136] a special agency was formed to facilitate the planning and construction of a pipeline for the transmission of natural gas from Alaska and northern Canada. We recommend that:

> 4.15 *where the Government decides to establish structures or initiate programs the arrangements for which might fly in the face of existing economic or social legislation, there should be means for the Government to deal with such matters itself. One obvious device to use would be special legislation.*

In short, existing political controls over agencies, while usually restricted to functions which have a significant policy content, are not, in our view, so clear and direct as they might

be, are not particularly open, and do not appear to be exercised in full awareness of the pressures they place upon the agencies and upon the integrity of their processes. The fact that many different forms of control seem to be used indiscriminately is itself a matter of concern. We recognize that uniform controls may be neither possible nor desirable, but some attempt should be made to rationalize the procedures adopted in particular statutes.

While we have tended to stress the negative impact on agencies arising out of the exercise of political controls, we must emphasize that appropriate controls, properly employed, can contribute in positive ways to the effective use of agencies by governments. The importance of coordinating governmental policy through a central organ like the Cabinet cannot be overstressed.

CHAPTER FIVE

Public Interest Representation and Rule-making

The general mandate of an agency may be structured by an Act of Parliament or subordinate legislation and given further precision by the government of the day or the responsible Minister. The courts too have a role, for theirs, of course, is the duty to determine whether the actions of the agency fall within the terms of its mandate. But the particulars of a mandate are often decisively shaped in administrative proceedings where an agency may benefit from representations made by interested constituent publics, political authorities, or agency officials themselves.

This chapter underlines the importance of consultation between an agency and its constituent publics. Although an agency can be so constituted that particular members are originally appointed to represent certain interests in agency deliberations, unless the whole body is weighted towards one interest, available evidence indicates that over time any particular agency member will come to identify much more with uniform positions taken by the agency than with the interest supposedly represented by that member. The preferred mode of representation, therefore, is to encourage the advocacy of constituent interests in the context of particular proceedings.

A. Public Interest Representation

Public interest representation in administrative proceedings can be quite useful to agencies, especially in situations where it is not yet clear to agency members themselves what information or expertise is important in performing statutory functions. This can arise when the agency is new, has recently expanded its jurisdiction or operations, or has had new criteria for decision-making imposed upon it. An example of the last variety is the addition in the 1970's of environmental factors to the matters to be considered by the National Energy Board before issuing certificates of public convenience and necessity for the construction and laying of pipelines.[137]

1. *Agency Proceedings as a Political Process*

At present the desire for public participation in administrative proceedings is particularly acute in matters affecting consumer costs (rate regulation) and the environment (e.g. the National Energy Board hearings and the Berger Commission hearings on the Mackenzie Valley Pipeline project). It appears, however, that participation is addressed to various ends.[138] Often it is aimed at influencing the agency in its approach to a matter before it, but some intervenors appear to be more interested in provoking wide public discussion through media reporting, and in stimulating discussion within a political arena, for example in Parliament. Intervenors will sometimes use agency proceedings as a forum for airing political or partisan views on matters outside the scope of the agency's mandate.

To some extent, this illustrates a significant problem; participation before administrative agencies is seen by many people as a way to participate in the political process. Indeed, an agency proceeding may provide the first opportunity for participation. At the legislative stage issues may not be sufficiently focussed to allow full and effective participation. Between the legislative stage and that at which an agency is

required to make a concrete decision on a specific application, policy decisions made by government are often low in profile and invulnerable to criticism by interests that might have something useful to say.

A broad base for public participation in agency proceedings will be supported, then, by those who place a high value on citizen participation in government, a value which is hardly inconsistent with our democratic traditions. It will be criticized, however, by those who take a more functional approach to agency decision-making and who prefer to restrict participation to those who can provide insight which will assist an agency in fulfilling its statutory role. In unduly deferring to the former, we run the risk of inhibiting the decision-making capabilities of an administrative agency when the underlying problem may be the failure of our political process to respond in other ways to the needs of people to participate in their government. To illustrate, an expropriation hearing sometimes becomes a forum in which policy planning decisions are attacked by those objecting to a project for which land must be expropriated. While people should not be denied an opportunity to voice objections to such projects, to raise them at the expropriation stage will usually be too late, and will be of no assistance to those deciding the narrow issue of whether the land in question is necessary for the project. The timing of participation is vitally important if it is to have value as part of our political process, and often it must precede agency involvement in a specific issue.

The manner in which the decisional process is carried out can bring new information or different perceptions to bear on an issue, and can influence the choice, by each participant, of the frames of reference to use and the principles to apply. For example, as our agency study on the National Energy Board points out, even where public advocacy has little immediate impact on agency policy or proceedings, in the long run such advocacy often fosters internal debate and subtle modifications in points of view among agency members.[139]

2. *Ascertaining Relevant Interests*

Administrative authorities do not yet fully appreciate the procedural and substantive implications of being attuned to the interests of the public in a highly pluralistic society. Yet, it is especially important for authorities that have a substantial policy-making role, such as regulatory agencies, to make the necessary adjustments. Most recognize that it is their mandate to administer a particular substantive area in the "public interest", but few have successfully discovered an effective, yet efficient manner of discovering just what that is. Perhaps the most useful first step in resolving this dilemma is to emphasize that the term "public interest" does not represent a monolithic interest to be taken into account by the government. It is the natural consequence of pluralism that there may be no such thing as a single public interest; rather, in any given context, there may only be a myriad of diverse and sometimes conflicting group and individual interests. And these interests may be formalized in legal criteria which themselves are not always accorded the same priority or weight. An agency cannot expect any one constituent group, or a single set of criteria of predetermined value, to represent the public interest that may be potentially affected by its action.

One of the first tasks an agency should undertake in developing its policies is that of ascertaining the panoply of various interests within the agency's actual or potential sphere of authority. The relevant constituency for an agency will depend largely on the nature of the agency's substantive functions.

For example, regulatory agencies involved with the administration and planning of business conduct, including monopolistic industrial activity, might define their relevant constituency as composed of the following categories of interests:

I. The government interests —
   — agency's own interest
   — interests of other agencies
   — interests of departments

— interests of Cabinet
— interests of Parliament
— interests of provincial government institutions
— interests of the international community

II. The regulatee's interests
— profits
— stable business environment
— minimal demands on it from government and other interests

III. The interests of clients of regulatee —
— rural
— urban
— commercial
— non-commercial
— low income
— middle income
— high income
— potential

IV. The competitor's interest (actual or potential)

V. The interests of employees of the regulatee

VI. Special interests —
— environmental
— other

Similar lists of constituent interests could be prepared for other types of independent agencies. The range of interests may, of course, be much more circumscribed where the agency has a small policy-making role and proceeds like a court. Nevertheless, any agency involved in the regulation, management or planning of an activity could develop a descriptive listing of the interests it ought to consider, much like the one outlined above.

Once an agency has identified its constituent interests, a task which must be reassessed in the light of each category of matter before an agency, the difficult task of ensuring that interest positions are represented effectively and efficiently

must be tackled. The facilitation of a wider range of interest representation might lengthen the time it takes the agency to make a decision, and increase the cost of the agency's activities. On the other hand, there are benefits from increased interest representations to agencies with a large policy making role. These include: first, an improvement in the quality of decision-making through allowing an agency to expand its information base and gain a sense of community values; second, the bringing into the open and thereby adding to the legitimation of the policy-making process by satisfying the desires of constituent interests to involve themselves in important public issues; third, the reduction of any general tendency towards unthinking administrative conservatism; and fourth, in the case of regulatory agencies, the reduction of the possibility of agency members being "captured" by regulatees.

The benefits are worth a certain price in delay and expense, but they are not benefits to be encouraged at any price. As with many dilemmas, the best answer is likely to result from the best balance in the format of agency proceedings, and it is this balance for which each agency must strive in each of its own substantive areas of decision-making. Needless to say, the need for, and encouragement of public interest representation before an agency varies according to the nature of the agency and the function in question.

But if public participation in the administrative process is to be significant, certain difficulties must be overcome. The experience of many federal agencies in both Canada and the United States, suggests that the major problems of ensuring effective representation of all the interests within an agency's constituent public at an acceptable cost, in terms of delay and complexity of proceedings as well as financial costs, fall within four categories: ensuring access to agency proceedings through appropriate service of notice and liberal rules of standing, while screening out unproductive or repetitious interventions; permitting meaningful participation by making relevant information available to participants in proceedings and allowing them a reasonable time period to assimilate the information and prepare their representations; providing for spokesmen for various interests if representation would not

otherwise be forthcoming, or financing public participation in appropriate cases; and properly designing procedures for effective and efficient participation.

3. *Notice*

A crucial step in ensuring the involvement of relevant interests in agency decision-making is the provision of adequate notice of agency proceedings. Our jurisprudence with respect to notice has primarily developed in relation to adjudications in connection with the issue of the "right to be heard". Thus, where a decision directly affecting a person's rights is taken, certain minimum procedural standards are required. But notice is also important to broad policy-making functions, and is of relevance to persons who might not traditionally have been considered as being directly affected by agency policies. The degree to which an agency should have a duty to consult affected interests before reaching broad policy decisions, including the making of statutory regulations for an agency as well as policy or rules of procedure not considered binding in a statutory sense, has become an increasingly important issue.

When an agency wishes to consult a broad range of interests, the means of giving notice can pose problems. Sometimes an agency may simply wish to extend an opportunity to appear. Here one might, on the grounds of efficiency, justify a notice model that puts each potential intervenor to the task of obtaining information concerning the existence and nature of the proceedings. The concept of constructive notice through an official publication like the *Canada Gazette* is a common legal circumvention of the difficult problems involved in notifying a wide, unidentified constituency. This will be insufficient, however, where an agency genuinely wishes to obtain a full range of views. It is recommended that:

> 5.1 *independent agencies should experiment with innovative notice techniques in connection with those types of proceedings where it is important to ensure that an agency will obtain a balanced picture of the issues at*

stake because there is a wide range of constituent interests affected by decisions flowing from the proceedings.

One approach might be for an agency to compile a list of persons and groups known to be interested in matters it deals with, and to provide them with comprehensive abstracts of issues coming before the agency. While the agency might be criticized as hand-picking potential intervenors, one must assume a reasonable amount of good faith on the part of the agency. As well, this is suggested as a way of augmenting more universal communication through the mass media, such as newspapers, radio and television.

One progressive approach to notice, adopted by the CRTC among other agencies, entails maintaining an extensive mailing list to which anyone can have his name added. The list includes libraries which can serve to extend notice even further. Notice is sent to everyone on the mailing list, advising of the application, where it can be inspected in Ottawa and elsewhere, and how interventions can be made. This complements another useful procedure which the CRTC requires by regulation: applicants for licence renewals are required to broadcast information regarding their applications, allowing for direct contact with the consumers of their product. New draft rules of procedure for the CRTC Telecommunications Proceedings also provide a mechanism whereby any interested subscribers may register with the CRTC and indicate specific areas of interest, for example specific carrier rates or conditions of service. They will then automatically receive copies of any applications relating thereto. The new rules would also create a subscription list of those interested in receiving copies of tariffs on a regular basis.[140]

Obviously, different approaches will be found useful by different agencies, and in the context of different kinds of proceedings. The problem is much more important for example, to agencies like the NEB, the CRTC and the CTC, whose hearings raise issues of a broad socio-economic nature, than to agencies like the Immigration Appeal Board, the Pensions Appeal Board or the National Parole Board, whose decisions

directly affect a narrow range of participants who can normally be easily identified and notified.

Time is another vital consideration. Notice is useless if reasonable time is not given to prepare for a proceeding. An example of inadequate notification can be found in the federal environmental impact assessment procedures associated with an application to build a nuclear energy plant at Lepreau, New Brunswick.[141] While Environment Canada had made reports of environmental consultants available in libraries prior to a scheduled public meeting, interested parties were given a mere three weeks to comment on complex technical reports which had taken the consultants eighteen months to prepare.

For the most part, notice requirements in many federal statutes and regulations do not recognize the concerns about comprehensiveness and timeliness we are adverting to in this discussion. While generally adequate in terms of giving minimum notice to easily identified parties, these provisions are perfunctory and virtually useless for leading other interested persons to participate effectively in proceedings and to add to the information base of an agency.

4. *Standing*

Participatory democracy recently has received an increasingly favourable response in Canada, through the introduction by most agencies of less strict criteria of standing for interested persons wishing to participate in agency proceedings. Devising techniques to reduce excessive and unproductive intervention is, of course, also important. An agency can require that an intervenor's position be stated in writing before proceedings begin, screen participants at pre-hearing conferences, and consolidate interventions which would otherwise be repetitious or overlap.

5. *Access to Agency Law and Information*

If the representations of constituent interests are to be effective in the context of particular administrative proceed-

ings, then they must have access to agency law and the relevant information available to the agency. Such access is essential to the preparation by those interests of representations which will actually assist agencies in the task of improving the quality of their decisions.

People should be able to learn more about an agency from their first contact with it. We recommend that:

> 5.2 *each agency should have a designated information officer or staff equipped to answer in simple language standard questions posed about the jurisdiction, procedures and policies of the agency. There should also be prompt and adequate responses to inquiries from the public.*

We also recommend that:

> 5.3 *agencies should produce for the public written materials explaining in simple lay terms their organization and jurisdiction, their general rules of procedure, and how the public may obtain information and make submissions or requests.*

We further recommend that:

> 5.4 *agencies should consolidate and make available for public inspection and copying: their decisions and reasons for judgment, including concurring or dissenting opinions; general rules adopted by the agency; and administrative manuals, instructions or guidelines on the basis of which advice is given or action is taken, except those which must be kept confidential for reasons of effective enforcement policy and the like.*

Existing agency legislation does not recognize the principle of public access to information in an agency's files; but the draft Nuclear Control and Administration Act incorporates it with respect to the proposed Nuclear Control Board, and freedom of information legislation presumably would make it apply generally. The Law Reform Commission endorses the principle of public access to government information. A recommendation that federal freedom of information legislation be passed to improve the quality of public participation in

administrative proceedings, among other objectives, is put forward and discussed in Chapter Nine.

The subject of disclosure of information and confidentiality in the context of agency proceedings is of interest also, and is the subject of this Commission's study paper on *Access to Information*.[142] That paper should be referred to for a more detailed discussion of this issue. Its importance to procedural justice in the context of a particular proceeding is treated to some degree in Chapter Six.

6. *Ensuring Support for Constituent Interests*

In order to represent an interest before many federal agencies, whether in an adjudication or a less formal policy-making process, a substantial financial outlay is required. Often it is desirable to have an experienced advocate, one with specialized experience before the agency involved. Due to the nature of the function and makeup of most federal agencies, expertise in the substantive matter being considered by the agency is also required.

In regulatory matters, economic expertise is almost always essential. The advocacy and other professional skills required are expensive. In most regulatory matters, the commercial or industrial entities being regulated can, without difficulty, obtain the required expertise. But many other relevant interests cannot.

Thus, in order for an agency to have the benefit of adequate representation of the broadest possible range of differing interests, the problem of redressing the imbalance of resources among the various constituent parts of the agency's public has to be resolved. At the risk of belabouring the point, it should be emphasized that techniques for accomplishing this task cannot be determined without the benefit of experience which only imaginative experimentation can provide.

Underrepresented relevant interests might be given access to the administrative process in an indirect way through

private "public interest" organizations. These could be encouraged and supported at a sufficient level to permit high calibre representation. The Consumers Association of Canada, which seeks to ensure that a certain broad ingredient of the "public interest" is developed and advocated, has received financial assistance from the Department of Consumer and Corporate Affairs for public interest interventions under the Regulated Industries Program.[143] We recommend that:

> 5.5 *government funding should continue to be made available for worthwhile public interest intervention activities.*

Adequate funding to such organizations affords one technique for improving the range of interests advocated before administrative agencies.

The number of interest group organizations proportional to population in Canada is not nearly so great as in the United States. In 1976 it was estimated that there were in excess of 3,800 public interest organizations in that country representing a great variety of interest perspectives. The lack of organization in Canada is a further impediment to be overcome if agencies are to ensure representation of all relevant interests.

Relevant interests which could go unrepresented because of lack of resources might be included in agency proceedings through some mechanism whereby the individual or group is reimbursed for the expenses incurred in making representations. But there are many problems associated with the mechanics of compensation which would have to be worked out in individual cases. For example, some types of proceedings might necessitate the payment of monies before, rather than after the proceedings; at least some compromise involving advances would very likely be required. The problem of establishing the quantum or ceiling to be placed on a compensation-fund would have to be considered. This might involve allocating a global amount for all intervenors in any one proceeding, which would then be divided. In some situations it might be more prudent to place an upper limit on the amount any individual or group could receive in a year, and so forth.

Various mechanisms could be utilized for the distribution of funds. One particular governmental organism could be designated as distributor of public interest advocacy funds, or individual agencies could themselves provide funding. However, when the Canadian Transport Commission held a hearing in 1975 on the issue of whether it could provide costs to intervenors, it decided that it could not on its own initiative.[144] As for the notion of establishing a special advocacy agency to administer funding for public interest representation, it has not yet met with success even in the United States, where there has been much lobbying and legislative debate on the subject.

In addition to the problems associated with the mechanics of compensation, there are substantive dilemmas to be resolved in deciding what groups or individuals should be eligible. A number of preliminary inquiries would have to be made by the funding authority. First, the authority would want to ask itself whether the interests or viewpoint of the candidate intervenor are already being adequately represented in the particular proceeding. Second, the authority would have to make a preliminary assessment of the proposed intervenor's ability to represent competently the interests it is seeking to represent.

This assessment could have unfortunate consequences. One would be the tendency to accord low priority to groups with little sophistication — a factor which may not be relevant to the overall quality of their advocacy. The natural tendency to prefer experience — a tendency which is partly good sense and partly the result of feeling more comfortable with the "known quantity" — can interfere with the task of granting access to new and different approaches and perspectives. Closely associated with this tendency of preferring established groups is that of preferring moderate groups. The assumption that moderate and experienced groups are more helpful to an agency than radical or inexperienced groups involves less logic than many administrators might like to believe, and so should be employed with caution.

The subsidizing of economically disadvantaged interests does not need to come entirely out of the public purse.

Techniques of "fee-shifting" have been suggested. One form of fee-shifting — which has been termed the "deep pocket" approach — is merely to award costs against the parties best able to pay them. There might be some merit in this, if the party forced to pay costs were in a position subsequently to spread them among the class of persons who benefited from the subsidized interventions.

A great many administrative proceedings involve situations where a party seeks a government privilege (i.e. a licence, a rate increase, a modification in the terms of a licence, etc.). In such cases, it could be judged as one of the costs of doing business that the party should have to support the participation of relevant interests who could not otherwise afford to participate. This option seems especially sensible in proceedings before agencies which regulate a monopoly service. This is not, of course, a magic formula because the costs can be shifted to a degree back to consumers through increases in sales or service charges. However, the added charge per consumer is minimal.

Indeed, in the recent Bell rate hearing before the CRTC, this approach was taken; costs were awarded against Bell to compensate public interest intervenors. The principles underlying the awarding of costs were carried forward in a draft of new rules of procedure on telecommunications. Those draft rules require carriers applying for rate increases to pay the costs of certain intervenors. The criteria that intervenors must meet, in order to qualify, reflect many of the considerations referred to above. The press release announcing the decision described the criteria as follows:

> Interveners will qualify for costs in cases where they meet four criteria. First, where they represent the interests of a substantial group or class of subscribers. Second, where they participate in a responsible way. Third, where they contribute to a better understanding of the issues by the Commission. And fourth, where the Commission considers they require the assistance provided by costs to make an adequate presentation.[145]

Underrepresented interests also might be given access to the administrative process through provision of economic support to legal service groups who specialize in litigation on

behalf of indigent interest groups. The Public Interest Advocacy Centre,[146] is an example of such groups. This kind of financial support might encourage the establishment of what are referred to in the United States as "public interest law firms". In that country, these firms have been funded, to a great extent, through donations from private foundations. The number of public interest law firms in Canada might increase if, as is suggested in the study paper on *Public Participation in the Administrative Process*, such firms were given the status of charitable organizations and the revision to Canadian tax laws proposed by the National Voluntary Organization were adopted to allow all individuals to deduct 50% of the value of charitable gifts they made from their income tax payable (a form of tax credit).[147]

The use of public interest law firms would encourage positions to be taken not merely on behalf of some nebulous public good, but on behalf of specific "clients". The development of law firms specializing in the representation of interests which were formerly underrepresented, would at least put those interests on somewhat the same footing in terms of legal services as the traditional interests which, after all, have always had their own special interest law firms. The problem with reliance on the "private litigation" techniques, is that they may tend to force agencies into increasing adoption of the adversary method — a move which, if overemphasized, can be counterproductive to the rational resolution of complex social, economic and technological problems.

Legal aid plans could be broadened to include administrative proceedings, and the eligibility requirements could be reshaped so as to facilitate the representation of indigent, yet relevant interests in administrative proceedings. But legal aid seems most appropriately designed not to represent interest groups, but to support the interests of indigent individuals appearing before courts or social agencies. However, the criticism voiced in respect of funding to public interest law firms also applies here; increasing the involvement of lawyers may bring the worst of procedural technicality without affording fuller consideration of all relevant interests.

7. *Encouraging Articulation of All Relevant Interests*

The making available of financial support and relevant information to constituent groups, and even the provision of public interest advocates, does not ensure the articulation of *all* relevant interests. Where individuals or groups feel they have a stake in a matter before an agency, but lack the money, expertise and information required for meaningful participation, they certainly will have problems in dealing with agencies but at least they can make their presence known. However, the interests of many individuals or groups may be potentially affected without their ever being aware of the fact. This will occur when groups or individuals with important interests do not perceive that they have a stake in a matter before an agency.

It is a phenomenon of planning generally that many issues are dealt with at a stage when it is unrealistic to suppose that many relevant interests will have perceived that the matter is one that is likely to affect them. For example, in discussions of the adoption of new technology or the control of hazardous procedures or substances, those who would gain from a change in the status quo may well be in no position to express their interests. Workers who would be employed if new technology or procedures were adopted are as yet unhired. Entrepreneurs who might be involved in a new or expanded activity are unlikely to have a strong position to advocate on matters in which they are not currently involved. Potential customers of a new or expanded service are as yet unaware of what they might be offered, and so are unlikely to push for representation.

Yet these interests — potential producers or consumers, potential employers or employees — should certainly be included in a list of any agency's relevant public. In situations such as these, where an important interest may go unrepresented because the relevant groups or individuals do not perceive that they have a stake in the matter, the agency should take steps to carry out public information campaigns and animate those interest groups, so that their position can be developed and advocated before the agency. Agencies should

take a similar course where relevant individuals perceive that they have an interest but are simply not sufficiently organized or sophisticated to participate effectively in agency proceedings.

The possible techniques for apprising relevant groups and individuals of their interests in issues of concern to an agency are as varied as human imagination can devise. The literature on techniques for communicating a subject to segments of the public and involving them in that area is voluminous. Community animation, public information initiatives, and public education programs have recently become areas of specialization for those interested in stimulating public participation in government. We recommend that:

> 5.6 *agencies discharging a substantial policy planning function should utilize such techniques whenever appropriate to induce effective public participation in such planning.*

8. *Governmental Representation of Interests*

In many cases there might be no private party participation in administrative proceedings to represent an important interest, yet the decision-making authority should take the interest into account. In these circumstances it may be important to have an advocate designated by the government to represent the interest.

One technique of ensuring that interests are not left out of account is the designation by agencies of public advocacy officers. The task of such officers would be to determine and select for representation relevant interests which would otherwise be unrepresented in agency action. This technique has both positive and negative implications. On the positive side, it would seem to be a useful addition to agency proceedings to have staff specifically charged with considering what interests, apart from those regularly represented before the agency, might be affected by a decision or program. This institutionalized requirement to broaden the agency's perspec-

tive could well improve communication on a two-way basis — from unrepresented interests to the agency, and from the agency to unrepresented interests. In fact, public advocacy officers could combine a useful mix of public relations and advocacy functions. The traditional adversary role might be compromised to some extent, but that model is not necessarily the best approach to interest representation.

Aside from an agency itself providing public advocacy officers, the Department of Justice might be asked to provide lawyers to assist in the representation of those interests. This technique has been incorporated in section 54 of the *National Transportation Act*,[148] which permits the Canadian Transport Commission to apply to the Minister of Justice requesting that a lawyer from the Department of Justice represent a public interest before the Commission, but the CTC has never availed itself of this provision.

Another government agency could also be designated to represent a particular interest in administrative proceedings. One version of this can be seen in the office of the Director of Investigations for the Bureau of Competition Policy. Since 1976, section 27.1 of the *Combines Investigation Act* authorizes the Director to intervene in the proceedings of any "federal board, commission, tribunal, or person who is expressly charged by or pursuant to an enactment of Parliament with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product . . .".[149] The Director may make representations and call evidence in such proceedings in respect of the maintenance of competition. Implicit in this arrangement is the notion that the public's interest in proper commercial practices — as defined in the Act — may be advocated before administrative agencies by the Director. This implicit purpose is made explicit in new draft combines legislation.[150] The proposed legislation would create the office of Competition Policy Advocate who would have the powers of intervention in agency proceedings currently possessed by the Director. Section 27.1 would be amended further to clarify that the purposes of any such intervention would be to make ". . . representation in respect of any aspect of the central

purpose of Canadian public policy expressed in the preamble to this Act . . .".

From time to time it has been proposed that a special agency should be created to represent broad public interests. Such an agency could develop consistent policies over time, since it would not have to act only in response to complaints from the public. This function of making policy and setting priorities would enable the agency to build internal expertise on substantive issues as well as in relation to administrative procedures. The most comprehensive example of a government attempt to ensure improved interest representation is the Department of the Public Advocate (DPA) in the state of New Jersey. The DPA is a cabinet level agency, and the Public Advocate sits as a member of the Governor's cabinet. This department has divisions responsible for the public defender service, inmate legal services, mental health advocacy, consumer complaints and a division of Public Interest Advocacy.[151]

9. *The Need for Procedural Innovation*

The principal concern, when choosing procedural models, must be in designing a process which allows administrative agencies to function in such a way as to fulfil the ends for which they were created. It is essential, we believe, to retain a governmental perspective, recognizing the need for a process which produces decisions having a high degree of "accuracy" (relating the decision to the information bearing upon the issues), "efficiency" (effectiveness at a minimum of effort and expense) and "acceptability" (measured in terms of our political and cultural expectations about how decisions should be made).

We recommend that:

5.7 *in order to strike the best balance in interest representation in the format of agency proceedings, agencies should engage in experimentation with different proce-*

dures, forms and techniques allowing such representation. Innovation should be encouraged.

It would be counterproductive to set rules of general application concerning procedures governing broadened interest representation in agency proceedings. We therefore recommend that:

5.8 *each agency should eventually develop for itself an appropriate set of rules of procedure taking into account public interest representation.*

Who participates in the process of decision making, then, is not answered by simply asking who may be affected by the decision (i.e., the issue of fairness). The question must also be asked: who has useful information and insight to contribute to the decision and can the participation of the person be justified in the light of the capacity of the process to fulfil its governmental goals? Different situations will require different choices about who should participate and what the scope and modes of participation should be. Much will depend on the kind of issues involved. Cases involving diverse interests and varying goals such as the choice of a site for a nuclear reactor most likely require different procedural models from cases decided on a more narrow information base and dealing predominantly with individual interests, for example deportation or revocation of parole.

B. Agency Rule-making

There is one part of the administrative process in which all interested persons should have the opportunity to participate, and that is rule-making. In many cases, agencies perform a legislative function through the making of rules (official policy) subordinate to statute. These rules include regulations and other statutory instruments, directives from the executive branch of government, formal policy elaborated in policy-making proceedings such as those conducted by the CRTC,

and so forth. Being non-elected legislative bodies operating with a degree of independence from Cabinet, there is some onus on agencies to take into account the views of their constituent publics, those institutions, groups and individuals whose interests may be affected by their decisions.

The arrangements for, and the timing of, rule-making should be such that the values of principled decision-making and participatory democracy are supported. A forum should be provided for public participation in rule-making which precedes, or at least operates externally to, agency action on specific cases. Despite the fact that some policies will continue to emerge first in the context of individual decisions or adjudicative proceedings, there should be greater efforts to separate policy considerations underlying a broad range of applications from special considerations relating to particular applications. Common policy problems should be dealt with as much as possible, within the context of a general rule. We recommend that:

> 5.9 *statutory authorities should move towards rule-making which, as much as possible, should take place in special proceedings designed for the purpose. Rules made pursuant to such proceedings would include regulations and other statutory instruments, directions from the executive branch, formal policy elaborated in policy-making proceedings such as those conducted by the CRTC, and so forth.*

Rule-making proceedings need not involve a public hearing. We recommend, however, that:

> 5.10 *procedures for rule-making should include, at a minimum, a legal requirement that an authority provide public notice identifying draft rules being considered for adoption, allow time for interested persons to comment on them, and take into account any comments made.*

By servicing the needs associated with rule-making, we believe the administrative process can become certain and more open, and to a large extent the responsibilities of agencies can be better fulfilled. Agencies should be encouraged to

formulate their policies before applying them and to develop procedures to ensure that they are made known. It is especially important for an agency dealing with a mass of routine applications to indicate the types of requirements which must be met for applications to be acceptable to the agency.

There are, of course, problems with this suggestion. Courts have been known to strike down agency decisions based on preconceived policies, taking the view that this precludes an agency from having an open mind on specific applications. On the other hand, if the agency has been open in the development and promulgation of policy, and has given due consideration to varying its general policy in specific cases, there would seem to be no inherent defect in this approach.

By setting up independent agencies Parliament inevitably authorizes them to make policy even where no authority is granted. Parliament should recognize this and ensure that agency policy-making as much as possible duplicates the more open parliamentary process. Public accountability is an important value at stake here. We therefore recommend that:

> 5.11 *enabling legislation should, as much as possible, expressly authorize rule-making by most agencies, so that the grounds for the exercise of discretionary power will receive maximum exposure.*

It is to be hoped that the making of explicit policies by agencies will stimulate Parliament to change, or to render more detailed, the basic policy criteria in legislation. Although Parliament often gives an agency vague powers initially so as to allow it leeway to develop its operations in an effective manner, the accumulated wisdom of an agency should be translated over time into legislative principles recognized and adopted by Parliament.

As to policies it is not bound by statute to follow, an agency should be able to make such occasional adjustments as it believes warranted. The only caveat here is that changes in policy should serve, and not erode, the value of coherence resulting from reasoned decision-making. Consistency in administrative rulings is highly desirable, for the adoption of

different standards for similar situations is perceived as arbitrary. Agencies should strive to apply their own precedents as much as possible; and when an agency changes political course, it should give reasons for doing so.

Increased rule-making would likely enhance the effectiveness of the administrative process. First, it is likely to provide for more efficiency in terms of time and expense. Rule-making is an effective way of communicating agency preferences, thereby promoting compliance with agency standards. The more issues are reduced to specific rules, the fewer will need to be debated in the context of a specific application. This can narrow the scope of adjudication. An agency might justify a fairly stringent standing requirement in a licence application, for example, excluding representations on issues which have been amply considered in prior policy-making proceedings.

Second, the more policy is reduced to general rules, the more informed an applicant is of the considerations which bear upon his application. If he wishes to challenge the policy, he is at least aware of what it is beforehand. Along the same lines, the agency has been forced to take a position and is not likely to approach an application in a state of confusion about the policy governing the case.

On a broader front, administrative rule-making and public participation therein indicate a new direction which the law has taken with the growth of the modern state. It should now not only deal with vested rights before the courts, or make statements of principle or set limits to the exercise of power through parliamentary action, but focus on planned and principled action for the common good. Administrative law should ensure that those who wield public power focus on, and accommodate, public concerns.

CHAPTER SIX

Guidelines for Administrative Procedure

As stated in the Foreword, the present mandate of the Law Reform Commission in the administrative law area is to study "the broader problems associated with procedures before administrative tribunals". But along with studying broader problems it is important not to lose sight of issues respecting, and values associated with, the choice and implementation of administrative procedures themselves. Procedures should be concerned with fairness, effectiveness, efficiency, principled decision-making, authoritativeness, comprehensibility and openness.

Although administrative law, in its broadest sense, includes the total juridical context within which administrative authorities operate, administrative procedure falls under the branch of administrative law which covers the body of rules governing the administrative process. As mentioned in Chapter Two, the administrative process comprises activities undertaken by administrative authorities leading to decisions or other normative acts of public administration from which direct effects on legal interests of persons are derived.

Administrative procedure concerns the manner in which the authorities carry out their functions at various stages of the administrative process, from its initiation to the time when

administrative decisions or other official acts acquire definitive status.[152]

It is difficult to generalize about existing procedures in the Canadian federal administrative process. They vary extensively from agency to agency and do not receive much attention under many enabling Acts or regulations. There is no code of rules or central body of guidelines, nor even an Administrative Procedure Act with skeletal rules to be incorporated by reference to specific types of functions, powers or procedures imposed on particular agencies by their enabling legislation.

The principles of natural justice and, more recently, the broader duty to act fairly have been developed through case law by the courts.[153] They have applied a presumption as to interpretation of legislative intent concerning statutory authorities that, barring express declaration to that effect, Parliament does not intend that administrative proceedings should be left to an authority's arbitrary or capricious designs.

There is at present no permanent corps of specialists who might offer advice as to which rules of procedure would be most appropriate for various agencies. The wide and inexplicable variation in statutory provisions concerning the powers and procedures of agencies carrying out similar functions has already been noted in Chapter Three to support the contention that more systematic planning and coordination is needed at the earliest stages of the legislative process.

A particular enabling Act will, it is true, sometimes spell out certain procedural requirements for an agency. It is not unusual to find stipulations for notice and hearing, as well as general directions respecting what an agency can consider as evidence. More detailed procedures are sometimes set out in regulations made by the Governor in Council, the responsible Minister or even the agency itself.

It seems fair to say, however, that most agencies have considerable discretion to determine the procedures they employ. Some have highly detailed rules; others have rules

which are sparse and general in nature. In some cases there are no formal rules of procedure at all, although the agency will probably have well-understood informal practices and may create new ones on the spot to deal with problems as they emerge. In other cases a single legislative authority will be exercised under differing procedures, especially where, as in the case of umpires under the *Unemployment Insurance Act*,[154] different judges are designated to act as tribunals without being bound by specified uniform rules.

Agencies often shape their procedures with an eye to the body of judge-made law. The Anti-dumping Tribunal and the Immigration Appeal Board have both changed certain procedures in response to decisions by the courts.[155] If it is believed that there has been undesirable judicial interference with the administrative process of a particular agency, corrective legislation can be enacted.

In terms of sources of principles of administrative procedure according to which administrative authorities really act, internal rules developed through policy statements, guidelines, circulars, administrative manuals, directives and so forth, are, of course, of great importance. Unfortunately, many such rules are not presently brought to the attention of the public and exist as "secret law", rightly condemned by Kenneth Culp Davis.[156] Administrative practices may also be of significance in developing models of procedure. However, these differ from time to time and place to place, and often lack the articulation which one associates even with the "law" internal to an administrative authority.

A. Administrative Hearings — Degree of Participation Required

Claims for a fair and open administrative process almost invariably focus on the importance of hearings. Hearings provide for a direct exchange between an administrative authority

and interested persons. Courts have held that certain decisions can be taken only after notice and a hearing, and a number of standard tests have emerged to assess the adequacy of these.

With respect to notice, we recommend that:

6.1 *parties to any proceedings should be given reasonable notice of a hearing by the administrative authority responsible, and informed of the nature of the proceedings, the time and place of hearing, and the issues to be raised.*

Broad problems concerning notice and consultation have already been treated in Chapter Five in the context of public participation and rule-making.

With respect to hearings, it is always relevant to question the extent to which a person is entitled to participate. The degree of control left to participants in the introduction and interpretation of information to be taken into account in a particular case can be of critical importance in its effect on any final decision, and in the impression left on participants or observers as to whether proceedings have been conducted in a proper manner.

Among the particular questions often raised regarding the degree to which an agency should allow participation by applicants or other interested persons in the hearing process are the following: Is there to be a hearing with interested persons present, or merely a consideration by the agency of written submissions? If there is to be a hearing with some party participation, is it to be public or *in camera*? Is representation of a participant by counsel or other agent to be allowed? Does a participant have a right not only to be heard, but to call evidence, produce documents and make representations? Should a participant be given the further opportunity to cross-examine and perhaps re-examine witnesses? Responses to these questions depend on such factors as the purpose of the particular hearing, the interests at stake, and the benefits accrued through the use of particular procedures as against the costs incurred in terms of such diverse values as efficiency and fairness.

B. Treatment of Evidence

Collateral questions can arise about the degree of control agency decision-makers should exert over the treatment of evidence in administrative proceedings. How much importance should the record of a hearing assume in the totality of a given administrative proceeding? In many types of hearings, it might be appropriate as well as convenient for agency panels to take official notice of many facts, not put on the record.

In other proceedings, an agency might need to take into account evidence which, if made public, would either undermine the operations of the agency or irreparably and unfairly damage the interests of some participant or third party. Evidence obtained from inspectors' reports would be of great utility to the Canada Labour Relations Board in carrying out its functions, but public release of such information would undermine the union certification process.[157] Evidence regarding commercial or industrial operations of importers or Canadian manufacturers is of great importance to the Anti-dumping Tribunal, but unless such evidence can be kept confidential, business competitors of the firms providing it might gain an unfair competitive advantage from its release.[158] The National Parole Board might wish to depend on information from counsellors, prison employees, fellow prisoners, spouses or other relations or acquaintances of prisoners up for parole, but a release of such information to the potential parolee or the public might have very detrimental results.[159] The balancing of interests between disclosure of information and confidentiality in administrative proceedings is considered further in the study paper on *Access to Information*.[160]

It should also be realized that from the agency's point of view the contribution made by even key participants in a hearing can be quite minor in certain types of proceedings. For example, the participation of a prisoner at an initial parole hearing before the National Parole Board might serve simply as a check on a miscarriage of justice in the odd case where the Board received misinformation in documents or in

personal assessments.[161] For most types of administrative proceedings, definitive solutions have not been agreed upon concerning the degree of participant involvement in the process, or the degree of control by a decision-maker over the information it considers.

C. The Purposes Hearings Serve

Our administrative law jurisprudence with respect to notice and hearing has primarily developed in relation to adjudication, and to a great extent these requirements have been viewed from the perspective of fairness. But as already noted in Chapter Five, the concepts of notice and hearing must be viewed from a wider perspective. They are important to broad policy-making functions as well, where there may be less concern about fairness than about offering sufficient scope to allow someone to participate effectively in the information gathering and policy-making functions an agency is attempting to perform.

There are two main purposes for a hearing which hold true of agency activities ranging all the way from general policy-making to adjudicating individual cases. First, a hearing allows interested people to make representations in an attempt to persuade the agency to render a favourable decision. Second, it helps members of the agency to appreciate and judge the case being made, taking into account all the facts and arguments of the persons who appear along with legal standards and policy imperatives.

D. When Should Hearings Be Held?

Whether one approaches notice and hearing from the standpoint of fairness or from a more functional standpoint, there are serious problems to be considered. When should an

agency decide to hold a hearing? Should it be a full hearing or be subject to restrictions? What restrictions are appropriate?

Generally the courts have determined that the closer administrative proceedings come to deciding questions involving initial restraints on liberty, confiscation of property rights, or the imposition of other significant sanctions, the stricter should be the procedural guarantees of fairness. We are in accord with this position, and recommend that:

> 6.2 *hearings with the full panoply of traditional legal procedural safeguards, including the right of parties to call and examine witnesses and present their arguments and submissions, the conducting of cross-examination of witnesses, and the making of decisions based on the hearings record, should be used by agencies when dealing with issues of this kind.*

The use of procedural safeguards should not be denied through resorting to potentially shallow conceptual dichotomies such as "administrative/judicial", "recommendation/final decision", or "privilege/right", which obfuscate the fact that basic interests are at stake.

Public hearings are presently employed by a number of agencies we have studied. The National Energy Board, the Canadian Transport Commission and the Canadian Radio-television and Telecommunications Commission, in particular, have extensive experience with hearings, although it would be wrong to convey the impression that agencies do, or could, use public hearings as a standard way of dealing with the many decisions they must make in the run of a year. The Air Transport Committee of the C.T.C., for example, averaged only nine public hearings per year from 1967 through 1974,[162] despite the fact that it deals with hundreds of licence applications annually. The vast number of files this agency is required to process has made it selective about those handled through public hearings.

For those functions in connection with which agencies are not obliged by statute to conduct hearings, hearings should be held selectively. Many decisions have to be taken quickly, and

hearing procedures could destroy the efficacy sought to be gained by reposing discretionary decision-making powers in administrative officials. As well, most agencies find that they are expected to perform more and more functions on proportionately decreasing budgets. They are subjected to complaints about delay, not only from businesses which are dependent on agency decisions, but from a general public demanding services directly affected by an agency. Indiscriminate proliferation of hearings could result in delay becoming the by-word of the administrative process in Canada. Agencies should proceed by negotiation where appropriate, and even rely in some cases on panels of decision-makers including representatives of competing interests. Only in a minority of cases can they resort to hearings for deciding matters.

Hearings are only one mode of increasing an agency's information base. Agencies must often rely on inspection and investigation to secure information. Numerous agencies need to engage in research and analysis. Agencies should engage experts like economists and other social scientists to inform them of the economic and social dimensions of problems, and employ staff to carry out fact-finding and analytical functions. Sometimes they should adopt market research and other effective techniques developed and used in the private sector.

E. Shaping Procedure: Minimizing Costs of Participation

Even in the minority of cases in which a public hearing is held, a dilemma is presented. On the one hand, we recognize the value of open decision-making, accessible to people and groups having legitimate interests. We see value in increased participation, not only from the standpoint of fairness and the integrity of the process, but in terms of better decisions. And yet we have serious doubts about the capacity of the process to handle the increased load. At the very least, then, it is

necessary to consider the extent to which agencies should actively solicit participation in their hearing processes, and the extent to which the hearing process may be modified to accommodate a broader range of participation.

In Chapter Five we stated that agencies should be encouraged to ensure that a comprehensive range of interests and values are taken into account before decisions having a significant policy content are taken. One of the consequences of taking this approach to administering an economic or social activity will be an increase in the "delay factor". How can a concerted "interest representation" approach be taken, where vast numbers of people might be interested in an issue, while at the same time getting on with the job in an efficient manner?

To the extent that hearings are opened up to broad participation, there may be a diminution of the quality of participation by those who obtain access. An agency which has traditionally made decisions after a formal hearing, with the trappings of a judicial trial, may find that it simply cannot handle increased participation in that way. If there are twenty intervenors on a rate application, each representing different interests, it may be totally impractical to entertain cross-examination as an element of the procedure. Some may regard this as a serious price to pay. As a technique, cross-examination has proved extremely useful for shaping issues, for exposing inconsistencies and vagueness, and generally for getting at the truth of a situation. But at the very least it may be necessary in many administrative hearings to curtail severely rights such as cross-examination with respect to certain classes of participants. It may be less unfair, for example, to deprive an intervenor of this right than a licence applicant, although this kind of judgment is never easily made. Of course, other techniques than cross-examination can be used effectively to allow for confrontation of different interest positions. For example, the CRTC in broadcast licensing proceedings has given interested persons the opportunity to make presentations and counterpresentations with an added opportunity for rebuttals, without allowing for cross-examination.

Perhaps it is necessary to start thinking in terms of trade-offs. Do we want more participation, but at a reduced level? More participation, but longer delays? Stabilized costs but less participation? Do we subsidize increased participation, but pass on the costs through regulated companies to their consumers or by taxation to a more general public? These are significant and difficult questions. The need to make such choices may be postponed, however, to the extent that we can identify rational adjustments to compensate for increasing requirements of participation.

On a general level, an effective response to the question of how to conduct hearings might be to build flexibility into the process, to allow different hearing procedures for different functions. It is important to determine which functions are best handled judicially, and which in some other way. If judicialization is largely incompatible with increased participation, then perhaps the need for it can be reduced by reassessing what procedures might be best for different functions, and then making appropriate adjustments.

The Canadian Radio-television and Telecommunications Commission, for example, has been able to accommodate a high degree of participation by placing less emphasis on formality.[163] To facilitate its work the Commission considers licensing and rate applications separately from matters of general policy or proposed regulations. The Commission frequently invites people to attend to present their views at its hearings, and on occasion has financed their costs of travel and accommodation. Its hearings are informal, and questioning is carried on only by Commissioners and Commission counsel. The Commission's procedures have, however, from time to time, been criticized because of its unwillingness to allow lawyers to play as prominent a part in its hearings as they do before other agencies.

At the same time the CRTC has been forced more than other agencies to make decisions about which intervenors will be heard. This places a difficult burden on an agency. The opportunity to intervene in regulatory hearings should be refused only where other techniques fail to make proceedings

manageable. Often less stringent approaches can be taken to minimize the risk that valuable time will be taken up by irrelevancies and repetition. One approach requires those who seek to participate to file a written submission, or at least an abstract of the matters to be raised before an agency. This forces potential participants to organize and focus their presentations and allows an agency to determine which presentations are similar and which conflict with one another. It provides an agency with the opportunity to resolve misconceptions and minor issues by providing for an exchange of written arguments. An agency can also hold preliminary conferences to encourage intervenors to consolidate proceedings so that a minimum of repetition occurs in the actual hearings. It may be able to persuade the potential intervenor that no useful purpose would be served by intervening separately.

Another technique to limit the time consumed by those who do decide to intervene is to reduce evidence to written form and pre-circulate it among the parties. This is almost a standard practice within major regulatory agencies now. Yet another is to encourage parties to meet at preliminary conferences, as has been done by the Railway Transport Committee of the Canadian Transport Commission, to secure agreement on uncontested facts and to isolate issues to be explored at a hearing.[164] These are but a few of many different approaches that can be taken to better accommodate participation at hearings.

The nature of the issues involved, and the work constraints of an agency, may demand something other than a conventional oral hearing. The Canadian Transport Commission, for example, has moved more and more towards what has been described as a "file hearing", although the various committees of the Commission have adopted variables of this core procedural idea.[165] In reviewing administrative action, courts have consistently made the point that administrative proceedings are not trials. Agencies do not necessarily deny natural justice or exceed their jurisdiction because they employ speedier and less formal approaches than courts. Much more reliance can be placed on written material. The important question is whether an agency acted fairly in the circumstances.

"File hearings" are capable of combining fairness with efficiency. Basically, the procedure involves the accumulation and exchange of written submissions in accordance with guidelines prepared and distributed by the agency, guidelines requiring specific information about the application and the proposal to be entertained by the Committee. The procedure allows for the efficient marshalling of information so that the application can be put through various stages of agency scrutiny. The files are processed by staff, and relevant information and issues raised by applications and interventions are set out for those who have to make the decisions. File hearings do, however, give considerable opportunity to agency staff to influence the outcome of an application, since decisions are often not directly based on the material in the file, but on a staff report.

The "file hearing" is, of course only one of several procedures an agency might find useful to deal with issues. The National Energy Board, which holds full and formal hearings for many of its adjudications, has also used a procedure referred to as an "expedited hearing" for processing some of its work. Essentially this does away with a hearing but allows interested persons to file written submissions. For other matters it has held a "limited hearing", which is a formal hearing limited to certain narrow issues, often to break up a large unmanageable issue into an orderly sequence of limited ones. Experience has led that agency to experiment with a number of different modes for carrying out its responsibility to hold hearings.

There are many types of cases where a court-like hearing is not warranted, but some kind of hearing is required for the sake of fairness or accuracy. To cover these situations, we recommend that:

> 6.3 *minimum procedural safeguards should be adopted requiring that appropriate notice of hearings be given, written comment from interested persons be solicited and considered, and the supplementary use be made of written interrogatories, oral comment and cross-examination in certain cases or on specific issues, at the discretion of*

the agency. This kind of hearing would include rule-making proceedings.

Procedural safeguards should not, however, be imposed where they are not wanted. We recommend accordingly that:

6.4 *in cases where individual life or liberty is not at stake, parties should be allowed to waive procedural rights so that safeguards otherwise required would not be applicable and case resolution might be expedited.*

There is also a need to structure informal agency action. We recommend that:

6.5 *agencies should develop official policies concerning the conditions under which informal advice can be given by staff, and procedures under which such advice can be easily referred to a higher level for review.*

The powers given to agency members relating to administrative proceedings can assume great importance. In the absence of statutory provisions, agencies could not compel persons to attend hearings, to take an oath, to give evidence or to produce documents, nor punish persons guilty of non-compliance with those demands. This is a subject about which little has been written in Canada, and it warrants further study. As was mentioned in Chapter Three, a Commission study paper is being prepared on *Statutory Powers of Independent Agencies*.

F. The Use and Allocation of Powers Relating to Procedure

1. *Keeping Control over Proceedings*

Regardless of the type of hearing held, the agency should, of course, manage its proceedings effectively. The obligation of an agency official conducting a hearing is like that of a

judge in the sense that the proceedings should at all times be governed with an eye to both efficacy and fairness. The major problem here is not that agencies exercise arbitrary powers with respect to the conduct of a hearing, but that they too frequently exercise too little control. In such circumstances, hearings can drag on with rambling, irrelevant or repetitive evidence being led, with the agency panel listening politely while time and money are being wasted. Firm chairmanship can expedite most proceedings without curtailing anyone's rights in any significant way. We recommend that:

> 6.6 *each agency should establish procedures whereby it may keep control over its proceedings and the timetable followed therein, and provision should be made for appropriate sanctions against parties who fail to comply with procedural rules.*

2. *Delegation of Power to Hold Hearings*

It seems likely that in order to cope with any increasing volume in public hearings, more agencies will have to delegate the power to conduct hearings to panels of members, single members, or staff hearing officers. Several agency statutes already provide for this.[166] The entire membership of an agency or even a designated committee will not be able to participate fully in every decision an agency is required to make. The very thought of such a development might raise the hackles of advocates who are firmly convinced that there should be an identity between the person who hears and the person who decides. Although traditional case law incorporates at most a rebuttable presumption against subdelegation, this hoary principle is riddled by statutory exception.

Time may be a crucial factor. Fifty-five days were taken up in 1974, for example, in a single Bell Canada hearing before the Telecommunications Committee of the Canadian Transport Commission.[167] To tie up a decision-making body for such a period may be impractical, even where an agency can be divided into modal committees, as with the CTC. Both that agency and the National Energy Board have begun to expedite hearings by assigning them to single members or panels.

Geography is also important, especially in a country with a vast territory and relatively small population like Canada. The deployment of individual permanent members on the road to conduct initial hearings, as used to be the case with Immigration Appeal Board hearings,[168] makes a great deal of sense here. Also the inclusion on a panel of members located in the region where a hearing is to be held, as is recommended in the study paper on the Canadian Radio-television and Telecommunications Commission,[169] appears to be a sensible technique.

Some agencies have permitted senior staff members to act as hearing officers, transferring to them the responsibility to preside at hearings and to report on the evidence and issues to the agency or the appropriate committee. This practice has long been followed in the United States, especially by large federal agencies which could not otherwise conduct the volume of hearings expected of them. Authority for adopting this practice exists in the *National Transportation Act*,[170] and has already been used, for example, by the Telecommunications Committee of the CTC.[171] Not only does it relieve busy Commissioners from considerable pressure, it facilitates the maintenance of an agency presence in various areas of Canada. We recommend that:

> 6.7 *the practice of delegating formal authority to individual agency members or hearings officers to hold hearings and make findings or recommendations for final decisions by an agency should be adopted, when appropriate, in proceedings where problems of time or geographic dispersion of cases are too burdensome for the agency sitting as a collegial body.*

Delegating this kind of authority should be done carefully, however, because in some cases there is a price to be paid. Where authority is given to a single member the interest of the agency is diluted, and experience shows that those who deal with a matter will usually carry the agency to its formal decision. While it is only natural that reliance should be placed on the member most deeply involved, that person's decision ought not to be merely rubber-stamped by the remaining members.

The need for reconciling the roles of the hearing officer and the agency is particularly acute when staff members are the hearing officers. To what extent should a hearing officer be required to make conclusions and recommendations, and to what extent should an agency rely on such determinations? The more agencies move towards this procedure, the more urgent it may become for agencies to engage in formal policy-making to remove policy questions as much as possible from adjudicative proceedings.

It also seems vital for agencies employing hearing officers to give high priority to establishing a system of internal review. Again, this depends on the extent to which it is felt desirable to allow hearing officers to make decisions binding the agency.

A specialized structure for internal review already exists within the Canadian Transport Commission, which relies on a Review Committee to review initial decisions made by separate committees established to deal with the various transportation modes for which the Commission is responsible. The Review Committee has interpreted its jurisdictional mandate as being quite narrow, and confusion has arisen over the grounds upon which it will overrule another committee.[172] Undoubtedly, there are difficult problems of internal administrative review which will have to be given more attention as an increasing number of agencies find they are unable to make many of their decisions acting as a unified body.

G. The Role of Agency Advisory Staff at Hearings

Other administrative arrangements which bear study relate to the various roles to be played by agency staff before, during and after hearings. The same persons who conduct

research or investigate a matter may be asked to participate in a hearing respecting it.

Any administrative agency with a large workload or broad mandate will invariably rely greatly on the work of its staff. Staff research will provide necessary background information pertaining not only to issues raised in the proceedings but to other issues as well, particularly those relating to the discharge of the agency's public interest mandate. In some cases agency members will not even have read the documentation on file, relying on agency personnel to summarize it. This is particularly true of what we earlier referred to as "file hearings". Staff will frequently participate as well in the sessions which the agency holds to reach a decision in a case.

The efforts of an agency's staff will inevitably have an influence on the agency. Unless a special point is made of testing staff conclusions against these presentations by careful questioning in the course of a hearing, the relative validity of the staff assessment versus that of presentations from other sources may not be established.

Agency staff may, of course, be hesitant to testify at a hearing. Even if staff members are called upon merely to prepare a simple factual statement, or give neutral professional testimony at a hearing, it might be difficult for them to comply effectively if they know that the agency itself is developing policy or is giving advice to the government which could fly in the face of the conclusions the agency members or staff themselves would come to if they were outside professionals.

Another factor is that agencies such as the Canadian Transport Commission have been guarded in their approach to releasing information obtained by staff. While there are instances when its committees have made staff studies available as aids in hearings, and have put staff members on the witness stand to explain aspects of proceedings, the CTC has been selective about what can be revealed. Disclosure of staff studies and mandatory disclosure on the witness stand, it is argued, impairs the candidness of staff communications.[173]

H. Disclosure of Information and Confidentiality

While it must be acknowledged that agencies may have legitimate reasons for resisting wide open access to documents and background information generated by staff, there would seem to be room for a compromise. We recommend that:

> 6.8 *agencies should, in appropriate cases, release and distribute information at their disposal, including research papers prepared by individual staff members which outline issues and disclose relevant information not elsewhere disclosed in documentation available to participants; but agency documents should not attribute to the staff as a whole any official position taken with respect to any issues raised.*

Such attribution might create undesirable tensions within the agency and unduly impair the free exchange of ideas and information at the staff level. However, the release and distribution of this sort of material would tend to canvass the dimensions of a problem by all the participants and to elicit a direct response from them.

Another reason given by agencies for resisting free and open disclosure of staff studies and related files is that they frequently contain confidential information acquired from other governments or from companies. Effective regulation requires information about the affairs and operations of those sought to be regulated and the impact of those operations on various sectors of the public. Obtaining this information may be difficult for an agency, since companies tend to be apprehensive about unfavourable publicity and fear leaks to competitors of information about business practices, and other governments may be chary of such leaks for various policy reasons. For reasons of confidentiality, therefore, there is a clear interest in maintaining some form of control over access.

On the other hand, agencies have a mandate to serve the public interest. To refuse disclosure of pertinent information

may not only be unfair to participants having a legitimate interest in the proceedings but may frustrate a proper disposition of an issue. Agencies must therefore reconcile as best they can the competing values of confidentiality and fairness to fulfil their responsibilities. One solution provided under statute for a few agencies, for example the Tariff Board[174] and the Anti-dumping Tribunal,[175] has been to give a limited statutory protection to confidential information relating to the business or affairs of any person, firm or corporation, prohibiting the agency from making it available for use by a competitor. Implicit in this is a discretion to release the information in a non-prejudicial way, indicating that there is no absolute claim of confidentiality which attaches to any class of material.

The study paper on *Access to Information* states that three basic considerations should be taken into account respecting the granting of access to information: the identity of persons requesting information and their interest in it; the relevant function of the agency holding the information; and the kind of information, personal information, or agency management information. The paper notes that the reason or motive for requesting information overlaps with the first three considerations and, if made a subject of interest, should be considered in that context.

I. Reasons for Decision

Whether a decision is highly discretionary or is strictly delimited by its terms of reference, reasons are essential to enable people to understand what the proceeding has been about; and it is important to have the decision put in writing so that there is an official record of it to which interested persons might have access. It is all the more necessary if there is to be any review of a decision. Appealing a decision made without reasons is difficult. And even if a decision is not appealable, to refuse reasons might make the process of

decision-making appear to be neither objective nor fair. To maintain the integrity of the decision-making process, we recommend that:

> 6.9 *agencies should make official decisions in writing. They should also be required to give reasons for their decisions at least when requested. Reasons should be made available, even when no hearings have been held, where decisions are taken directly and adversely affecting persons whose dossiers are the subject of a decision.*

Unfortunately, even when an agency consistently produces reasons for decisions, the product may be of little assistance. According to the study paper on the *Canadian Transport Commission*, the reasons given by the Air Transport Committee of the CTC are seldom adequate;[176] and the study paper on the *Anti-dumping Tribunal* points out that the Tribunal often gives incomplete reasons.[177]

J. Accessibility

An agency's procedures should be designed to make it as accessible as possible. Concepts like notice, hearings, participation, disclosure of information and reasoned decision-making are all related to accessibility. Creating an accessible agency, however, involves more than just extending rights to participate in agency proceedings.

Procedures must be made simple and clear, and steps must be taken to explain to people what the procedures are and what is required of them. The process must be comprehensible. There must be a shift in attitude so that procedures are regarded less as a matter of convenience to an agency and more as a matter of assistance to those who rely on the agency for a benefit or privilege, whether it be a welfare payment or a licence to carry on an occupation.

Many federal agencies appear to devise their procedures on the assumption that those dealing with them will obtain legal assistance. This is understandable and perhaps desirable where the principal constituents are corporations or organized groups. But agencies also deal with people who are not accustomed to retaining lawyers. The National Parole Board has traditionally excluded the right of legal representation. Other agencies, like the Employment and Immigration Commission and the Pension Appeals Board, are so enmeshed in the problems of people that it is vital that every effort be made to assist people in their dealings with these agencies.

In some cases, legal aid services may assist in facilitating access to the administrative process. One special program at the federal level is run by the Bureau of Pension Advocates, which provides legal aid and representation to veterans in cases dealt with by the Canadian Pension Commission or appealed to the Pension Review Board. The Bureau has branch offices in eighteen Canadian cities and maintains lists of experienced local lawyers who may be designated to handle cases.

Consideration should be given to making legal aid available more generally for proceedings before federal administrative authorities, especially in cases heard by social agencies that determine welfare benefits or the status of individuals. We recommend that:

> 6.10 *the federal and provincial attorneys-general should designate appropriate officials to study jointly the possibility of incorporating into legal aid plans and federal-provincial cost sharing formulae, an effective mechanism for legal representation of individuals, where appropriate, before federal administrative agencies.*

But these services can accommodate only such a small percentage of cases that it would be unwise to rely on them as principal solutions to the problems of accessibility. Without a commitment by agencies to service the needs of their constituents, reflected in the procedures they follow and how they use them, there is little hope of having a truly open process. An agency must create an air of openness. A conscious effort

should be made to make available even material which may not be required to be produced by law, but that may be regarded by a party as significant.

The difficulties of which we speak are not necessarily apparent at the decision-making stage, for example, where an appeal on a pension matter or on an unemployment benefits claim is taken. They may arise much earlier. People should be able to learn more about an agency from their first contact with it.

While one of our principal concerns has been the interests of unrepresented individuals, it would be misleading to imply that the problems of accessibility can necessarily be solved by access to legal counsel. Even lawyers can find agencies inaccessible at times, particularly when they do not specialize in practice before administrative tribunals. In extreme cases, such as those before the Air Transport Committee of the CTC, this has helped to exclude all but a small group of lawyers from agency proceedings.

The fact that different agencies often employ different procedures can also be confusing to lawyers, especially where the procedures are not readily available in concise, readable form, if at all. While we recognize that procedures must necessarily vary to accommodate different agency functions, we recommend that:

> 6.11 *agency procedures should not be unnecessarily complex or incomprehensible to the lay public. They should not be designed solely for specialized practitioners.*

K. Need for Administrative Procedure Legislation

Our research on the Canadian federal administrative process leads to the conclusion that there is a sufficient number

of problems relating to administrative procedure — in terms of inadequacies and anomalies — to justify that we recommend:

> 6.12 *general legislation should be enacted incorporating minimum administrative procedure safeguards or providing the means for the development of common procedural guidelines.*

Administrative Procedure Acts are in effect in Ontario[178] and Alberta,[179] at the federal level and in most states in the United States,[180] and in a number of Western European countries. Guidelines developed pursuant to the *Tribunals and Inquiries Act*, 1971,[181] are used in the United Kingdom.

The Law Reform Commission is currently engaged in preparing a Working Paper on guidelines for administrative procedure in which the alternative approaches to administrative procedure legislation will be examined. That Working Paper will address in detail many of the procedural problems raised here and elsewhere in this paper. But, based on work done to date, and with reference to other recommendations made in this Paper, we can already mention a list of some of the matters which should be dealt with in such legislation: reasonable notice of a hearing to parties to any proceedings; public notice with opportunity to comment in the context of rule-making; provision for a hearing with the full panoply of traditional procedural safeguards in proceedings where the imposition of significant sanctions is being considered; the making of official decisions in writing; and the giving of reasons for decisions, at least on request by a party.

Legislation dealing generally with administrative procedure might, of course, include provisions concerning the statutory powers of administrative authorities or the establishment of a body to advise authorities on administrative law matters, as in the *Statutory Powers Procedure Act*[182] in Ontario, or regarding access to information, as in the codified *Administrative Procedure Act*[183] in the United States. However, the question whether any or all such matters should be included in one federal statute or code in Canada is a subject presently being considered by the Law Reform Commission.

CHAPTER SEVEN

Administrative Agencies and the Courts

Throughout the common law world, the courts have traditionally been looked upon as the major instrument of control to curtail abuses of power by administrative authorities. If a public authority, whether a Minister, a department or official, acts beyond its statutory powers, it can be summoned before the courts for acting in excess of its jurisdiction. As well the courts will, in certain circumstances, control administrative action that is basically unfair or unjust.

A. Various Mechanisms for Review of Administrative Action

Judicial review is, of course, by no means the only mechanism available to review administrative action. Objections made by citizens or corporations to decisions or actions of administrative authorities have become one of the major sources of litigation in the modern welfare state, and various other mechanisms have been developed to deal with them. The power to settle such disputes has been divided up among

various types of administrative bodies according to the domain of activity involved. This helps to explain the extreme fluidity of the notion of "administrative tribunal" in our law. In some cases a centralized administrative body such as a department of government contains within it entities to which appeals can be made against decisions taken elsewhere within the body. In other cases an initial or even final departmental decision may be questioned before an independent administrative agency. In yet other cases, a review body within the structure of an independent agency will review an initial decision of the agency. Certain administrative decisions, even those of independent agencies, can be the subject of an appeal to a Minister or to Cabinet. In sum, there is a complex network of means of recourse against decisions of federal administrative authorities.

B. Centralized Review in Federal Court

Despite these various means of review, however, it is the judiciary, comprised of persons chosen from the ranks of the organized bar, who are still largely depended on to guarantee fair and just government administration. This function is facilitated by the application of consistent principles developed over the years. This consistency can be furthered if there is a common core of personnel who continuously interpret and apply those principles. To this end, Parliament has granted the power of judicial review of federal administrative authorities exclusively to the Federal Court of Canada. Members of that court, now numbering sixteen, are becoming more and more expert in the field of administrative law and in the interpretation of the particular provisions of the enabling legislation of the statutory authorities whose activities they are called upon to review.

Some (though diminishing) voices still call for a return to the fragmentation among provincial superior courts of the

authority to submit federal administrative action to judicial review, as existed before the creation of the Federal Court. Such calls can find some basis in tradition, the avoidance of travel and trial scheduling convenience, but the Law Reform Commission believes these reasons are overborne by the need for consistency and expertise. For that reason, as we proposed in our Working Paper on the *Federal Court*,[184] we recommend that:

> 7.1 *the Federal Court should retain exclusive jurisdiction for judicial review of federal administrative authorities.*

C. Principles of Natural Justice

As noted earlier, the courts have evolved a body of public or administrative law founded on the principle that governmental agencies which decide rights must act in a fair and reasonable manner. Thus courts will strike down decisions not made in accordance with the principles of "natural justice", that is, those violating elementary notions of fair play. For lesser tribunals, these principles have included the right to an unbiased judge, the right to adequate notice of administrative action, the right to a hearing, the right to be advised of the case on the other side, and often the right to be given the reasons for a decision. In simple terms, natural justice has long required that a party to a court-like proceeding before an administrative tribunal be accorded a fair and honest hearing, although not necessarily the type of hearing one would receive in a court of law.

Not every administrative action calls for the full panoply of procedural safeguards within the rubric of natural justice. The courts, as a rule, require this only when administrators exercise what are categorized as judicial or quasi-judicial powers. In most cases, this means decisions where personal or property rights of an individual are at stake; for example, where land is expropriated, taxes are levied, licences revoked,

or an individual is disbarred from practising a trade or profession. This can include situations involving disputes between parties. On the other hand, decisions which are purely administrative or fully discretionary are rarely interfered with by the courts; for example, decisions made by a Minister or an official on the basis of his opinion. Such decisions can include those governing the deportation of aliens, imposing safety standards or releasing prisoners on parole.

The distinction between "administrative" decisions and "judicial" and "quasi-judicial" decisions can be viewed as arising out of the attempt by courts to fashion an appropriate role for themselves in reviewing the actions of administrative authorities. Courts are conscious of the fact that all decisions cannot be made on the basis of an official evidentiary record, and that some decisions must be made on the basis of policy considerations transcending the individual concerns of people who, in one way or another, are affected by those decisions. They recognize that in the case of decisions of an "administrative" nature, it is better for courts to exercise restraint and to defer to non-judicial processes envisaged by Parliament.

In the vast majority of cases, it is recognized that judicial review is not necessary because the orders or decisions in question do not affect anyone in a significant way and virtually no one would want to seek such review. Administration would bog down if it were otherwise. But there remain cases at the margins where there should be judicial review and yet courts have felt obliged not to act because of the somewhat arbitrary distinction between "administrative" and "quasi-judicial" decisions, and the fact that the cases in question seemed to fall on the administrative side of the fence.

D. Duty of Fairness

Although courts continue to recognize the "administrative/judicial" dichotomy, they now appear more willing to

intervene in a wider range, if not a larger number, of cases than before. Recent case law developments suggest that formal decisions by administrative authorities may be reviewed whenever basic fairness has been denied. In Canada, the terms administrative and judicial have acquired different meanings in different cases and have proven to be insufficient to express important differences among powers falling into the same category. Courts now seem more likely to recognize the necessity of looking at the circumstances of each case to determine whether there is a duty to act in a fair and reasonable manner, and to invoke attendant procedural safeguards rather than simply to categorize.

This approach has recently been accepted by the Supreme Court of Canada in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, a decision which will likely prove of critical importance to the future evolution of Canadian administrative law. Chief Justice Laskin, giving the majority opinion, relied on recent decisions in the British courts and other sources recognizing the emergence of a duty of fairness involving procedurally something less than the full array of safeguards afforded before lesser tribunals under traditional requirements of natural justice. He accepted the principle set forth by Megarry J., in *Bates v. Lord Hailsham* [1972] 3 All E.R. 1019 (Ch.D.), that, in the sphere of the so-called quasi-judicial, the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. The Chief Justice further stated:

> What rightly lies behind this emergence (of a duty to act fairly) is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question . . .''[185]

The Commission welcomes this decision. In our Working Paper on the *Federal Court*, we had expressed concern about the artificial bifurcation of administrative actions into ''quasi-judicial'' and ''administrative''.[186] The adoption of the two terms in section 28 of the *Federal Court Act*[187] has certainly

impeded clarity of reasoning in decisions of the Federal Court of Appeal on cases involving judicial review of administrative action. According to its own terms, the section applies only to "administrative decisions required by law to be made on a judicial or quasi-judicial basis". The Court has referred to this provision in refusing to impose basic procedural requirements on prison and parole authorities in their dealings with prisoners, or on customs and excise officials in the conduct of their operations under the *Anti-dumping Act*.[188] On the other hand, the labelling of certain activities of an administrative body as "quasi-judicial" has arguably led to the court's imposition of more procedural constraints on such a body than the statutory enabling provisions relating to it would seem to warrant. This appears to have been the fate of the Anti-dumping Tribunal.

The *Nicholson*[189] decision sets the stage for questioning the appropriateness of maintaining the terminological dichotomy of quasi-judicial and administrative modes of action on the part of public authorities. It may be better to regard the distinction as having served its purpose, and to concentrate on ways to articulate more precisely the considerations which should control procedural standards. Indeed, the Commission recommends that:

> 7.2 *the artificial compartmentalization of various administrative activities through the use of such labels as "quasi-judicial" or "administrative" should be avoided in any future legislation defining the scope of judicial review or regulating administrative procedures.*

Such distinctions tend to reinforce an inflexible approach to questions of administrative fairness and justice in a society which is in full evolution.

E. Limits of Judicial Review

Interestingly, the legitimacy of judicial review has never been so firmly established in Canada as in some other coun-

tries. In the United States, for example, the Constitution preserves "due process" and the *Administrative Procedure Act* of 1946[190] accords wide rights of judicial review to aggrieved persons. In Canada there is no general statute applying to federal administrative bodies, and the "due process" clause in the *Canadian Bill of Rights* has yet to receive any significant judicial content, although in the case of *Commonwealth of Puerto Rico v. Hernandez* (No. 2), [1973] 2 F.C. 1206, the Federal Court of Appeal appeared to equate this with the principles of natural justice. However that may be, courts have for long insisted that it is their role to review the decisions made by administrative agencies where certain conditions exist. Even where legislatures have expressly stated that administrative decisions are to be final and not subject to appeal or review of any kind, courts have nonetheless intervened and overturned decisions on the ground of lack of jurisdiction. More specific provisions are sometimes enacted by Parliament, for example, subsection 122(1) of the *Canada Labour Code*, as amended in 1978,[191] which limits such review to paragraph 28(1)(*a*) of the *Federal Court Act*.[192] In our Working Paper on the *Federal Court*, we noted our reservations about the use of the so-called privative clauses. We there expressed the view that the better way to cope with such issues is through the exercise of judicial restraint.[193] The question is by no means free from difficulty, however, and we propose to return to the question in a Report.

At common law, the courts had developed a broad concept of jurisdiction embracing many defects such as the denial of natural justice, extension of a statutory mandate through a misinterpretation of the statute, and procedural error of a fundamental nature. While reluctant to interfere patently with the merits of a decision (except where exercising a statutory appellate role), courts have steadfastly persevered to keep decision-makers honest and fair and within the limits of their mandate.

F. Statutory Right of Appeal

Today at the federal level, the principle of judicial review of public administration has considerable support in legislation. The enabling statutes of a number of the more important administrative agencies, for example the Canadian Radio-television and Telecommunications Commission, the Canadian Transport Commission, the National Energy Board and the Immigration Appeal Board provide for an appeal if leave is granted to the Federal Court of Appeal on a question of law or jurisdiction. Thus, if an agency errs in law or acts beyond its statutory powers or contrary to natural justice, its decision can be reviewed by the Federal Court of Appeal and ultimately by the Supreme Court of Canada.

G. Application for Judicial Review

In addition, the *Federal Court Act*[194] makes general provisions for judicial review of federal administrative action. As already mentioned, section 28 permits the Court of Appeal to review final decisions required to be made on a "judicial" or "quasi-judicial" basis. Other decisions may be reviewed by the Trial Division of the Federal Court. Section 18 gives that division the right to issue injunctions and writs of *certiorari*, prohibition, *mandamus* or *quo warranto*, or to grant declaratory relief against federal boards, commissions or tribunals. This statutory scheme provides a fertile field for technical distinctions and jurisdictional disputes, and invites controversy about the steps to be taken to get an administrative law matter before the Federal Court in a given case. To solve this problem, we proposed in our Working Paper on the *Federal Court*,[195] and we recommend again here that:

> 7.3 *the Federal Court Act should be amended so that judicial review may be initiated by a single type of appli-*

cation for review, whatever form of relief may be desired, thereby doing away with the arcane knowledge and obscurities surrounding the prerogative writs.

H. Extent of Court Jurisdiction

In the Working Paper, other suggestions for improving the law regarding judicial review of administrative action are made. One recommendation we reiterate here is that:

> 7.4 *judicial review, whether for illegality or unfair procedure, should continue to extend to all federal statutory authorities, whether they be Ministers, government officials, or administrative bodies.*

However, it also stated that the Cabinet, in making decisions, should be subject to review for illegality but not for unfairness on the ground that political responsibility was the appropriate safeguard to respond to the latter charges. In light of the decision of the Federal Court of Appeal in the case of *Inuit Tapirisat of Canada v. The Right Honourable Jules Léger*, [1979] 1 F.C. 213, such a statement appears to be too categorical. Therefore, we propose to qualify our position appropriately in our Report.

I. Grounds of Review

The Working Paper further recommends, and we do so again here, that:

> 7.5 *the grounds of review and the forms of relief should be expressly articulated in legislation, but in an open-ended way so as to permit future evolution.*

It proposes that the court should be enabled to review federal administrative authorities for action contrary to law, including:

failure to observe the principles of natural justice; failure to observe prescribed procedures; acting *ultra vires*; error in law; fraud; unreasonable delay in reaching a decision or performing a duty; lack of evidence or other material to support a decision; and failure to reach a decision or to take action where there is a duty to do so. The term "administrative action" would include a "decision" and failure to make a decision as well as reports and recommendations that are likely to be acted upon.

J. Forms of Relief

The Paper also proposes that the court should be able to grant relief by way of any such order as may be necessary to do justice between the parties, including: an order quashing or setting aside a decision; an order restraining proceedings undertaken without jurisdiction, any breach of natural justice, or any breach of procedural requirements prescribed by statute or regulation; an order compelling the exercise of jurisdiction or observance of natural justice or statutory or regulatory procedures; an order referring the matter back for further consideration; a mandatory order compelling action unlawfully withheld or unreasonably delayed; or an order declaratory of the rights of the parties. It also says that relief against the Crown should continue to be by declaration of rights, although consideration should be given to extending the power to issue an interim injunction to cover the Crown as well.

Beyond the recommendations of that Paper, we recommend that:

> 7.6 *consideration should be given, as far as possible, to putting the Crown on the same footing as individuals with respect to claims for judicial relief against it.*

We propose to study broader problems related to the privileged position of the Crown in litigation and administrative action at some point in the future.

K. Alternatives to Present System of Judicial Review

The foregoing proposals assume a type of judicial review according to existing legal approaches. Aside from the prevalent opinion regarding judicial review of administrative action, however, there are two alternative and conflicting views which have been mooted and merit discussion. Under one view, the courts should become interventionist and review administrative actions *de novo* and on the merits, as well as on the basis of legality and fairness. Under the other approach, courts should stay away from reviewing administrative action, letting expert administrators implement their decisions and bear responsibility without outside interference.

The extent to which courts, through devices like judicial review, should be relied upon to give shape to the administrative process poses difficult questions. Is the process in need of increased emphasis on lawyers' values, aimed at fairness to the individual? To what extent, if at all, will this lead to better decisions? Does not even unsuccessful judicial review put pressure on an agency to modify its policies or procedures?

Many considerations must be taken into account before attempting to answer these questions. Can we afford to aggrandize the role of judicial review in the face of mounting costs associated with litigation? Judicial review is expensive, and a substantial increase in its incidence may be a luxury our society can ill afford. It is time-consuming and frequently unproductive. Relatively speaking, few administrative decisions are, or are susceptible to being overturned. Those overturned are always subject to legislative reversal if the result of a court's decision is not in line with the policy of the government. Also, short of legislative reversal, an agency itself can attempt to effectively circumvent unpopular decisions through the time-honoured method of distinguishing them from a case currently under consideration before it.

Another consideration concerns the ability of courts to make proper decisions in areas of expertise that have been

entrusted to agencies because of a perceived need for specialized handling of these areas. There is a risk that the intervention of courts into many areas of the administrative process, if not made with careful restraint, will have a detrimental influence on the ability of agencies to cope with the problems for which they were established to respond.

Yet another consideration concerns the ability of ordinary courts of justice, as they are now organized, to provide an adequate forum for review of administrative action. Adjudicating between two or more parties, as judges do most of the time, may not be the most appropriate way of achieving the skills and outlook required to carry out an effective review of administrative action. True, judges trade in justice, and justice certainly is the concern of judicial review. To seek justice in the relationships between private individuals is not, however, the same as seeking justice in the very special environment of relationships between private individuals and public authorities. Justice, in this context, requires both an efficient management of public interests and the existence of adequate safeguards for private interests. The structure of our courts does not at present reflect this basic difference in the roles of the judiciary as adjudicators on private rights and as reviewers of administrative action. This has led several commentators in this country to advocate the setting up of administrative courts or of administrative divisions within the ordinary courts.

These commentators question whether the ordinary courts can make proper decisions in areas where administrative authorities have a particular type of expertise to deal with problems which, in the opinion of Parliament itself, require specialized handling. Review of administrative action, it is urged, requires an extensive knowledge and a clear understanding of the requirements of modern government. This, in turn, makes it desirable that public administrators and those who are called upon to review their actions to keep them within the bounds of legality and fairness be brought intellectually closer together. We have already mentioned the tensions that arise between public administrators and lawyers about the ends and means of administrative action. Unless a better mutual understanding is achieved, judicial review will in

many cases remain a rather academic exercise. One would look to a reviewing body itself to go beyond these tensions, and to strike the right balance between them. Critics wonder if our courts, as they are now organized, could develop such a integrated approach.

The Law Reform Commission is not so pessimistic about the role of the judiciary in guaranteeing good public administration. The courts can play an important part in supporting a system of checks and balances among branches of the government. They can enforce the principle of legality and insist that statutory standards are met. We also believe that maintaining residual powers in the courts to support basic constitutional values, reinforce procedural safeguards and to respond to injustice has a salutary effect. The approach now taken by the courts allows them to decide on matters involving principles of natural justice or the duty of fairness. In connection with the administrative authorities and situations over which Federal Court jurisdiction is maintained, we favour, as noted earlier, providing that court with simpler forms and more liberal grounds of review than now exist under the *Federal Court Act*.[196]

If some commentators question the ability of courts to deal appropriately with administrative questions, others would support more judicial intervention and demand that administrative decisions generally be supported by "substantial evidence". Yet others would like to see courts or other appellate bodies involved in *de novo* consideration of administrative decisions on the merits. We would not go so far. Any major changes from present institutional modes of review of federal administrative action would require long deliberations and difficult policy choices by the executive branch and Parliament. Basically, what we suggest here and in the Working Paper on the *Federal Court*[197] are improvements in the existing system, as well as a number of complementary reforms.

L. Institutional Reforms Needed

One approach to institutional reform meriting consideration is the rationalization of administrative review structures, either at an intermediate level or in the form of novel type of court. The authors of the Commission's study paper on *Unemployment Insurance Benefits* recommended that one administrative review tribunal be set up to deal with any litigation involving federal social security schemes such as Unemployment Insurance, the Canada Pension Plan, Old Age Security Benefits, and Family Allowances.[198] In a majority of cases the tribunal's jurisdiction would be at a second level of appeal, its involvement coming only after intervention on an initial level by authorities referred to by the Acts establishing the various schemes. This would remove the heavy burden now imposed on judges of the Trial Division to act as umpires on unemployment insurance benefits appeals. In the longer term, it would be conceivable that the tribunal's jurisdiction could be extended to include veterans' pensions and allowances. We think the proposal has considerable merit, and recommend at this time that:

> 7.7 *the members of the Trial Division of the Federal Court should no longer sit as unemployment umpires; this task should be assigned to a specialized tribunal.*

Whether the decisions of such a tribunal should, in turn, be subjected to judicial review by the Federal Court is another question. It could be a specialized court other than the Federal Court with the Supreme Court of Canada retaining the power of ultimate judicial review.

We would prefer the centralization of review functions in the Federal Court of Appeal, so as to maintain as much consistency in federal administrative law as possible. This, however, presupposes that the members of the court would not be burdened with too many cases. As we noted in the Working Paper on the *Federal Court*, the Court of Appeal's jurisdiction should be so framed as to ensure it adequate time for reflection and to allow it to function collegially, so that it

can provide consistent guidance to the Trial Division and administrative authorities.[199] In particular, the high volume of immigration appeals the Court now has to deal with should be lifted from its shoulders.[200] The Commission recommends that:

> 7.8 *immigration appeals should be transferred out of the Federal Court of Appeal to the Trial Division (as we proposed in the Working Paper on the Federal Court), or to a specialized administrative tribunal (as proposed by the Canadian Bar Association's Commission on the Federal Court).*

In either case, there could be an appeal to the Court of Appeal, and with leave of the court or the Supreme Court to the Supreme Court of Canada.

CHAPTER EIGHT

Professional Standards

Administrative agencies can be helped to respond to certain basic values of the administrative process through technical procedural requirements imposed by law. However, real success in furthering these values in the end depends on the competence and commitment of agency members and staff. To be successful an agency must achieve a high degree of credibility, and the most important factor that contributes to credibility is a perception on the part of the public that those who serve on the agency are well qualified to do so. Consequently, the government must appoint the right people to run the various kinds of agencies, and give them the proper training, guidance and incentives to carry out their tasks.

Independent agencies need to maintain both professional standards and political sensitivity while working under statutory directions that are often dated or incompletely articulated, in a complex political milieu with fluctuating reference points as to what constitute the relevant facts and values to take into account in making decisions. That such agencies must always be scrupulously non-partisan hardly needs further emphasis. Effective and appropriate agency management under such conditions is rendered more difficult because of the vulnerability of governmental bodies that do not operate under the

immediate supervision of Cabinet Ministers, and so do not have a direct and legitimated source of political support, the voting public.

A. Appointment of Agency Members

An agency's approach and responsiveness to its diverse responsibilities is highly influenced by factors relating to the people who comprise it, their backgrounds, outlooks, preferences and obligations. The status, training and career patterns of members of administrative agencies, therefore, raise issues of legal policy that cannot readily be ignored.

All of the members — as distinct from staff — of federal independent agencies are appointed by the Governor in Council. This is also true of judges, but judicial appointments have come to be systematized in the context of a structure of consultation designed to ensure the quality of the appointees. Even these controls, which are informal and themselves subject to continuing abuse and criticism, are absent in the process of appointments to administrative agencies. In general terms, the appointment of agency members proceeds as follows.[201]

The senior appointments process is administered by a small secretariat within the Privy Council Office that reports to the Assistant Secretary to Cabinet responsible for Machinery of Government. This secretariat has come into operation only within the last decade — an indication of how great the proliferation of agencies has been in recent years. When a vacancy appears in the membership of an agency, or when a new agency is created, nominations are made to this Secretariat. Appointments of members of independent administrative agencies are made completely without reference to the Public Service Commission and never involve public advertisement. Nominations for the position of chairman or vice-chairman usually come from the Prime Minister's Office or

from the Minister through whom the agency reports to Parliament. Nominations for other members come from the relevant Minister and, frequently, from the head of the agency. The nominations are commented upon by this secretariat — although the criteria or considerations employed are unclear. This operation has been described by one Privy Council official as a process "done on the back of an envelope".

Especially in regard to chairman and vice-chairman positions, one step in the process involves a political clearance through the Prime Minister's Office. This includes consultation with the Minister who may be sponsoring the nomination and with regional ministers. A security check may also be involved where it is felt necessary. Once this process is complete only one name goes to Cabinet for approval. Where the nomination concerns a chairman or vice-chairman, it will usually be presented by the Prime Minister to his colleagues; otherwise the nomination is presented by the relevant Minister.

Even though some agencies have been in existence for many years, and the nature of the skills and experience required for the job should be well known, to date there has been no systematic preparation of job descriptions to assist in the appointment process. A candid observer might remark that it is amazing for the government to have developed multi-page descriptions of duties and functions for relatively menial jobs, and none whatsoever for senior executive positions. We recommend that:

> 8.1 *for each agency composed of Governor-in-Council appointees as members, there should be general written guidelines indicating the desired qualities or expertise an appointee to a given post should possess.*

However, one can weigh and total all the "paper qualifications" of respective candidates and still miss crucial attributes which just cannot be quantified — leadership, flair for the task, sensibility and judgment. These qualities will have to be based on reputation, that is, the judgment of friend and foe alike as to the prospective candidate's likelihood of getting the job done with as little turmoil and acrimony as possible in the

circumstances in which it needs doing. For new or reorganized agencies, of course, it often takes a while to develop appropriate parameters for their operations, and thus specific job criteria for their members and staff.

In the majority of cases, highly competent individuals are appointed to agency membership. Even so, isolated cases do persist of appointments of individuals totally unsuited to the tasks required. More objectionable than these isolated cases is the negative public perception generated by this unstructured system of political appointments. It gives rise to the appearance of partisan government reward to "politically helpful" individuals rather than appointment for intrinsic merit. It also has the effect of creating the impression that the agencies are used to assist loyal but feckless individuals who are having job placement or career maintenance problems elsewhere. This perception hampers agencies because their effectiveness can be impeded if, whatever may be the truth of the situation, members are believed to have insufficient professional qualifications.

To improve the quality of the membership of independent agencies it would be beneficial to obtain appropriate professional advice regarding appointments in addition to the advice provided by existing Privy Council mechanisms. In the United Kingdom, the Home Secretary must take into account recommendations made by the Council on Tribunals before appointing members to administrative tribunals.[202] At the federal level in Canada, we recommend that:

> 8.2 *an Administrative Council, discussed further in Chapter Nine, could advise the government on appointments of members to agencies; but, even if that were not to be done, existing associations in the private sector could be asked to comment on a short list of nominees in appropriate circumstances. With respect to appointments to major regulatory agencies in areas such as transport, communications and energy, prior consultation with provincial governments might also be desirable.*

To promote the recruitment of competent persons for agency membership, we recommend that:

8.3 *the government should consider placing public job advertisements asking interested people to file applications for full-time posts as members of agencies. Nominations to the post of chairman or vice-chairman could remain dependent on final determination by the Cabinet.*

Whatever the appointments process may be, an attempt must be made to select individuals who represent the various interests an agency must take into account in performing its function. Professional training, job experience in a relevant sector, geographical and minority group concerns, and, in appropriate cases, such interests as consumer or environmental ones, should be taken into account in filling agency positions. The Commission recommends that:

8.4 *greater effort should be made to broaden the perspectives of agencies through the appointment in appropriate cases of persons with varying backgrounds and training who represent interests an agency must take into account in performing its functions.*

In particular, the Commission recommends that:

8.5 *the government should sustain a high level of commitment to placing qualified women in key positions. This goal can frequently be more easily achieved by means of appointment by Order-in-Council than by filling positions through the public service job placement process. Through the appointment of more women to them as members, independent agencies could be in the forefront in giving equal status for equal qualifications.*

B. Provisions for Tenure

Unlike judges, who are appointed during good behaviour to a statutory age of retirement, members of most independent agencies are appointed for diverse terms of years pursuant to the various enabling Acts; those who are not may be

appointed "at pleasure".[203] This can create uncertainty in the minds of agency members concerning subsequent employment opportunities. The fact that the career of the member of an agency may depend upon other government appointments, together with the fact that the Cabinet itself determines salary ranges and annual increments, means that agency members may feel (or may be thought by the public to feel) subjected to heavy political pressures owing to their ongoing scrutiny by the government of the day.

As was pointed out in a Commission research paper on the *Composition of Federal Administrative Agencies*, the membership of federal independent agencies is heavily weighted toward people who are age 55 or over, and who are settling into their last position in the employment market before retirement.[204] The Commission recommends that:

> 8.6 *the terms of service of agency members respecting such matters as the number of years an appointment will last and security of tenure should be re-examined so as to make agency positions attractive to a wide range of persons.*

C. Performance Evaluation

All agency members are subject to annual performance evaluation that is used to assess individual candidates for reappointment, promotion or for a new appointment.[205] A performance evaluation sheet is completed each year by the agency head on each of the other members of the agency. This form is then forwarded to the senior member of the Committee of Senior Officials (C.O.S.O.) on Executive Personnel, which is responsible for reviewing the performance of Order-in-Council appointees. C.O.S.O. is composed of the Clerk of the Privy Council, the Secretary of the Treasury Board, the Chairman of the Public Service Commission, and three deputy ministers appointed for three-year terms. There is no requirement that the performance evaluation be shown to, or dis-

cussed with, the various members. However, in 1978 the Privy Council Office wrote to agency heads suggesting that in view of the privacy provisions of the *Canadian Human Rights Act*[206] it might be appropriate practice to discuss with members their individual evaluations.

The performance of agency chairmen and vice-chairmen is assessed at annual meetings which the Secretary to the Privy Council, the Assistant Secretary to the Privy Council responsible for Machinery of Government, and the senior members of C.O.S.O. hold with individual Ministers to discuss all high level executives who report to each Minister. These assessments go to C.O.S.O. together with relevant performance information gathered from the Treasury Board and the Public Service Commission. C.O.S.O. makes a collective judgment about performance and makes a recommendation to the Cabinet Committee of the Public Service regarding salary adjustments. Cabinet, with advice from the Advisory Group on Executive Compensation and from C.O.S.O., sets the salary ranges for the senior positions (D.M., S.X. and some P.M. classifications), and within these ranges Cabinet also determines annual increments. Salaries among ordinary full-time members of any given agency are usually set at a common level, with personal incentives, if any, depending largely on the more desirable job assignments being given to worthier members by their chairman.

As with the appointments process, the current method of performance evaluation sometimes gives rise to the perception that rewards are given to individuals whose decisions are "politically helpful", and punishment is rendered to individuals who have not been so helpful. In practice, the performance appraisal of senior appointees probably reflects a more realistic judgment than the annual appraisals of civil servants; the percentage of senior appointees rated as superior and above average is much less than in the public service in general. However, the psychological influence which the evaluation process may have on agency members is unknown and the perception that it may be unduly influential and inappropriate is a real concern.

Another issue that permeates the rating of appointees to agency positions is how to determine the value of one agency as distinct from another in terms of levels of job classifications for status and salary purposes and relative effectiveness of the performances of agency members. Presumably, a move towards better defined agency mandates and job descriptions, and a more open and structured selection process would facilitate such evaluation.

D. Professionalism

The existing appointments and performance evaluation processes require reform in order to facilitate the overall improvement of agency professional standards. The independent agencies play a major role in government administration, and political authorities should respect the status of appointees to agencies in keeping with the importance of the positions to be filled. Professionalism is a value to be appreciated as much in government as in the private sector.

Of course, government political interests and goals, together with the attractiveness for temporary occupation at the level of the highest agency posts, should be weighed against the importance of designating competent people with relevant training and skills to get the job done. It should be recognized that certain jobs, especially those concerned with broad policy-making functions, might best be conferred upon generalists rather than specialists.

The possible impact of the past experience of a candidate for an agency post should be considered by the appropriate authorities in making appointments. Some agencies, for example, the Canada Labour Relations Board, are deliberately structured to provide representation for the major contrasting interests coming before them. Most agencies, however, including those in the regulatory field, are not, and more emphasis seems to have been placed on factors like effective administration and expertise.

Problems may readily surface where the regulated industry has been developed within government, or within a government-industry partnership arrangement. An example has been the relationship between the Atomic Energy Control Board and the nuclear industry, much of which industry in Canada, outside the mining sector, has been government owned. Until the early 1970's the AECB consisted almost entirely of the heads of other government agencies involved in the nuclear industry or in nuclear research. Despite efforts to broaden the perspectives of the Board, it still has no members with backgrounds in law, social sciences, environment or health, nor a specific representation from such economic sectors as labour.[207] However, the manner in which that Board is constituted might well be changed in the near future. In November 1977, a draft *Nuclear Control and Administration Act*[208] which would have replaced the old AECB with a new Nuclear Control Board, was introduced before Parliament. The proposed Board is designed more along the lines of other regulatory agencies, and appointees to it would, presumably, be representative of varying backgrounds.

E. Bias and Conflict of Interest

Improved professional standards require that agency members pursue their functions in an unbiased manner. In one sense, however, bias is inevitable when competent professionals are sought, because the experience and training they have which benefits an agency in a particular subject-matter often carries with it the sharing of a value system with some of those whose interests are at stake in the agency's decision-making process. This means that there can be excessive sensitivity to the claims of those emerging from a similar milieu. Thus, the very characteristics which enable the regulator to understand the technical problems of the regulated industry may handicap him in fulfilling his role as protector of the public interest. Since this kind of bias is inevitable, agency

procedures and practices should be designed to ensure the forceful advocacy of interests other than those of the major regulated industries — a theme more fully developed in Chapter Five.

In addition, administrators must take extraordinary care to avoid the appearance of bias.[209] Clear cases of conflict of interest regarding Order-in-Council appointees are now dealt with under the Public Servants Conflict of Interest Guidelines issued by the Governor in Council in December, 1973,[210] and are supplemented to a certain degree by specific provisions under the enabling legislation of certain agencies.[211] Such things as accepting offers of expensive gifts, or of showing favouritism to one applicant as opposed to another without taking into account the merits of their proposals, are matters which administrators readily perceive as inappropriate. However, administrators must regularly deal with situations which are not so easy to define as being unacceptable, but may, nevertheless, give rise to the appearance of bias. For example, regulators must stay in close contact with the daily activities of the regulatees; one method is to meet periodically for meals or at conferences with industry representatives to discuss activities. If the agency member permits the regulatee to pay for these, or even if he pays but these meetings are frequent, the appearance of bias may be created. Even outside what the regular courts say about the principles of natural justice and what conflict of interest provisions prohibit, agency members need to develop a special sensitivity regarding such situations in order to protect and project the high standards of character and integrity required of such important officials.

F. Problems of Collegial Agencies

One impediment to the continuing improvement of professional standards is the confusion resulting when agencies are composed of several members and must take decisions and actions on a collegial basis. Confusion may derive from the

lack of direction as to what is expected of individual members and the lack of definition of the relationship among members, between the chairman and other members, and between members and staff.

A number of the enabling Acts for specific agencies do not give the chairman explicit power to direct the work of co-members, as opposed to the power to direct staff which is always granted. The Commission recommends that:

> 8.7 *the chairman of each independent collegial agency should be given statutory power to direct and control the members and staff, unless a particular member or members carry out major functions unrelated to those of the agency as a whole.*

Regardless of whether the chairman assumes a dominant role in agency activities and the setting of priorities, it should be assumed that the routine work of an agency as outlined under its statutory mandate will be carried out. However, the relations between staff and individual agency members and the way in which discretionary activities, particularly those of conceptual significance, are carried out will be strongly influenced by the type of leadership, whether it is relatively unified under the chairman or dispersed among members or staff.

The leadership of the chairman can be viewed as operating along a spectrum, from a *de minimis* position of influence where he or she serves principally as a point of contact with external individuals or bodies, through an intermediate position where he or she works to allocate roles and jobs effectively between members and among staff, to a directorial and supervisory position where the chairman's own style and managerial stamp are put on agency decision-making, planning and administration. Somehow, a happy medium needs to be struck to keep an agency operating effectively while at the same time keeping fellow agency members and staff content. The clarification of job descriptions and mutual expectations before an individual is employed would be helpful; but perhaps the most challenging part of agency leadership is how to treat certain matters of potential or actual interest most

effectively before they become ensconced as a part of the official agency agenda.

From an administrative law point of view, a number of specific questions might arise in connection with different collegial leadership patterns and role allocation. To what degree should official agency decision-making be made by agency members as a collegial body? Should the chairman, or other members individually give direction to interpretation of statutory and regulatory provisions in "case" judgments or policy statements? Should official dissenting opinions be allowed by individual agency members or, indeed, should individual opinions be allowed to be voiced at all? There are no pat answers applying across the entire spectrum of agencies.

The extent to which members give agency staff specific directives or allow them discretionary leeway is also important, and raises interesting questions. To what degree should staff be given its head as to conceptualization, research and advisory work, and so forth, within the bounds of the statutory framework of the agency and within limits of discretion and decorum which demand at a minimum the rubber-stamping by agency members of official agency acts which in reality have been initiated and implemented by staff? What are the functions of the agency's legal counsel during hearings? Such questions are very important in day-to-day agency operations and deserve careful attention.

More specificity in job descriptions, greater definition of the role of the agency head and the institution of proper management practices can serve to alleviate some of these difficulties. However, real improvement also depends on the institution of regular training programs.

G. Training Programs

In order that agencies may continue to improve professional standards, there should be some organized system of training, both introductory and continuing, for agency members and staff. Some training programs dealing with general

issues on procedures could involve members from all agencies. Here the experience and insights of members of one agency are instructive to members of other agencies. A pilot program of this sort was held in April, 1978 under the joint auspices of the Law Reform Commission, the Public Service Commission, and the Privy Council Office for members of federal agencies.[212] A second program under the same auspices was carried out in March, 1979, and not so restricted.[213] It was a success too, in our view. The government should consider instituting similar programs on a permanent basis.

This type of training program, cutting across agency lines, would also be useful at the staff level. One result might be the definition of new or better defined categories of jobs common to many agencies. Thus, for example, a corps of persons capable of serving as hearing examiners to find facts and develop evidentiary records for agency members might be developed. These individuals would then be available, as caseloads demanded, for posting in one agency or another within a group of agencies with similar powers and procedures.

Regular training programs are held by the federal government of the United States for agency hearing examiners or, as they are now called, administrative law judges. An excellent guidebook, the *Manual for Administrative Law Judges*, written for training and informational purposes, was prepared in 1974 under the auspices of the Administrative Conference of the United States by Mr. Merritt Ruhlen, a retired administrative law judge.[214] The Law Reform Commission is planning to examine this approach to the training of hearing examiners to see if it might be adapted to meet Canadian needs.

Training programs or kits of training materials should also be developed in the context of each individual agency. The precise skills and knowledge required for particular tasks would be highlighted and the general concerns dealt with in inter-agency training programs could be applied in the particular context.

Some agencies have already instituted a system of training for their new members. The most developed of these is that of the Canadian Pension Commission.[215] For a new Commis-

sioner there is a three to six month "break-in" period during which the new member is assigned to an experienced commissioner who acts as the new member's prime tutor. Several minor tutors may also be assigned. For most of the period the new member is assigned to cases only as an observer. Near the end of the period the new member is permitted to write one or two decisions concerning pension entitlement, and these are subjected to rigorous critical scrutiny both as to style and substance. It is only after this process that the member is assigned a full case load. However, all members are subject to ongoing scrutiny through a system of quality control over decisions. Under this system all decisions made by any one commissioner must be reviewed by two other commissioners. Those three must agree on the decision before it can be issued as a decision of the Canadian Pension Commission. If they cannot agree, then the file must be reviewed by a panel of five commissioners; if that panel cannot agree, then all commissioners currently in Ottawa must meet to assess the entire file.

Training and monitoring such as this would be valuable for any agency. However, few agencies are as large as the Canadian Pension Commission, which has twenty-four members. Consequently, most agencies would not have the time or resources to develop their own in-house training materials and programs. It would, therefore, seem appropriate for a government body responsible for training programs, the key example presently being the Public Service Commission, to assist them. It should avail itself of the support and input of other appropriate government bodies or individual officials in carrying out this task. In keeping with the needs for training mentioned above, the Commission recommends that:

> 8.8 *there should be some organized system of training, both introductory and continuing, for agency members and staff in order that agencies may continue to improve professional standards; to assist agencies which are too small to organize their own training programs or materials economically, or to prepare programs in which various agencies with similar interests desire to participate, a government body responsible for training programs should be asked to undertake a major organizational role.*

CHAPTER NINE

New Institutional Controls over Administration

It is with a bewildering array of institutions possessing various combinations of powers, procedures and practices that the Government of Canada engages in the regulation of social and economic activities and promotes its own projects. For the near future it seems almost inevitable, and not altogether undesirable, that a variety of independent agencies will continue to be created to meet the needs and desires of Canadian society.

Diversity in approach to the solution of diverse problems is essential; but the value of diversity must not be a cloak for disorganization, failure to render governmental bodies accountable, or lack of regard for fairness to the individual. Variations of institutional arrangements and activities which have this negative effect should be reduced. One way to establish some degree of order over a miscellany of governmental bodies is to impose systematically arranged administrative controls. Unfortunately, there is no such system of controls in Canada at the present time.

In Chapter Two, a passage from the Report of the Glassco Commission on Government Organization was cited that referred to "general legislative efforts" by other jurisdictions designed "to establish greater consistency of principle

and regularity of form and practice'' in respect of administrative agencies.[216] This chapter will examine some institutional initiatives toward administrative law reform which Canada might take in the light of certain foreign efforts in that direction.

If one takes administrative action as a central point of interest in administrative law reform, then one asks how the administrative environment might be shaped and administrative authorities motivated to act appropriately in various circumstances. An obvious response to this question is that means should be provided to allow those touched by the administrative process to involve themselves effectively in it, and controls over administration should be devised to prevent institutional distortions or maladministration to the degree that this is practical, to guide administrative procedure, and to provide corrective measures in response to those cases where injustice still occurs.

Although a certain number of controls over administration are now in place at the federal level in Canada, there remain obvious gaps in the structuring of the machinery of government and in the provision of means of protection of the public. In light of this situation, we examine here a few institutional reforms which could be instituted to meet Canadian needs.

A. Freedom of Information Legislation

In contemplating the interests of the citizenry, there comes to mind the need in Canada, as a parliamentary democracy, to encourage more open government and more opportunity for public debate on issues of importance to the polity. As we stated in Chapter Five, this calls for access to information which may be available under present government practices to government officials, but not to interested persons outside the government or to the public at large.

There has long been interest in many circles in Freedom of Information legislation which would, *inter alia*, put federal administrative authorities under an affirmative obligation to inform the public about their structures and operations, and make agency manuals and internally developed law available to the public. As was also mentioned in Chapter Five, administrative authorities should adopt those practices whether legislation is passed on the subject or not. Furthermore, interested persons should be allowed to demand the duplication at cost of information on file with an administrative authority, provided such information does not fall within limited categories of information exempted from disclosure.

The Liberal government of the day took a step in this direction when it first released a Green Paper on *Legislation on Public Access to Government Documents* in June, 1977,[217] and then proceeded to discuss the terms of related draft legislation with government officials during the following two years. Spokesmen for the Conservative Party, then in opposition, continued to press for a more comprehensive Freedom of Information Act, as they had for some time past.

About the same time, the Province of Ontario had established the Williams Royal Commission on Freedom of Information and Individual Privacy that carried out in-depth research on the subject,[218] and the Provinces of Nova Scotia and New Brunswick passed legislation.[219]

The Canadian Bar Association (CBA) has also actively encouraged the passage of a federal Freedom of Information Act, and in March, 1979 published a draft bill prepared by the Association's Special Committee on Freedom of Information.[220] In the bill, a review mechanism is provided in the form of an Information Commissioner acting as an officer of Parliament to respond to applications from individuals who feel they have been improperly denied access to information requested.[221] The Commissioner is vested with power to examine records and issue advisory reports and, in the face of Ministerial refusal to release information, independent judicial review is allowed with the court being given power to order the release of records.[222] The desirability of establishing an

Information Commissioner as a level of first appeal from refusals of government officials to release information, is also mentioned in our study paper on *Access to Information*.[223] Such an institutional innovation would avoid the extremes of a complete blockage of information through Ministerial refusal or of immediate appeal to the judiciary for assistance following such refusal.

As was pointed out in a study published by the CBA under the title *Freedom of Information in Canada: Will the Doors Stay Shut*?,[224] the government, in preparing any type of freedom of information legislation, will have to take into account current legal and administrative provisions binding civil servants under the *Official Secrets Act*,[225] section 41 of the *Federal Court Act* dealing with Crown privilege,[226] the effect of the oath of secrecy[227] on how civil servants deal with documents, the classification system for documents,[228] the 1973 guidelines for the production of papers to Parliament,[229] and the rules governing the transfer of documents to the public archives.[230] The Law Reform Commission recommends that:

> 9.1 *general legislation dealing with freedom of information, including provision for an Information Commissioner, should be passed and proclaimed as soon as it is practicable; however, the Government should also make appropriate changes in practices and legislation regarding official secrets and confidentiality, and the status and use of claims to Crown privilege.*

B. Creation of an Ombudsman

Experience in Canada and other countries strongly suggests the need to improve the mechanisms whereby administrative decisions can be challenged by aggrieved individuals. One mechanism for the control of the exercise of administrative discretion which has steadily gained more

prominence than any of the others is the Ombudsman. The office of the Ombudsman has been defined in the following manner:

> An office provided for by the constitution or by action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials, and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports.[231]

Originating as an institution in Sweden in 1809, the ombudsman notion first took roots in a common law jurisdiction in New Zealand in 1962,[232] and has rapidly expanded to other countries since then. No attempt will be made here to summarize the voluminous literature on the use by other jurisdictions of this technique. The fact that there is, as yet, no federal Ombudsman with general jurisdictional authority here does not indicate any lack of acceptance in Canada of the "grievance office" approach to redress of grievances relating to government administration. Indeed, each of the provinces of Canada, except Prince Edward Island, now has its own Ombudsman.[233]

Furthermore, at the federal level, the *Canadian Human Rights Act*[234] creates an institution with a substantial ombudsfunction. In addition to the Human Rights Commission's powers to receive and investigate complaints,[235] the Act also creates a Privacy Commissioner to act in effect as an ombudsman in relation to matters of personal information contained in government data banks.[236] Also, the Office of the Correctional Investigator has operated for several years as an ombudsman in respect of the grievances of inmates of federal penitentiaries.[237]

Draft legislation creating a federal Ombudsman, tabled by the then government of the day in 1978,[238] displayed an even greater acceptance of the ombudsman approach to improving government administration. It was designed to bring the Privacy Commissioner and Correctional Investigator within the aegis of a new Office of Ombudsman. Experience in New Zealand, Australia,[239] the United Kingdom[240] and nine

Canadian provinces indicates that there is a large volume of complaints about government maladministration in jurisdictions following the British parliamentary tradition that are not effectively responded to through traditional techniques, such as the use of the good offices of elected representatives, or of internal administrative complaint bureaux. The Law Reform Commission recommends that:

> 9.2 *legislation creating a federal Office of Ombudsman, which would incorporate in its list of functions those presently carried out by the Privacy Commissioner and the Correctional Investigator, be passed as soon as possible.*

C. The Use of Administrative Appellate Bodies

The major political parties have declared their commitment to the ombudsman technique as a necessary tool for protecting citizens against governmental abuses. However, the ombudsman technique should not be depended on to deal with administrative problems to the extent that the overall systemic improvement in the review of administrative action is diminished. Generalized improvements in the assessment of decision-making quality and in arrangements for administrative review will not alone result from the operation of a mechanism designed principally to deal with single problems in isolation. While attention to individual complaints is essential, more widespread change must be informed by a broader perspective and approach.

The Law Reform Commission recommends that:

> 9.3 *the examination of existing discretionary powers held by administrative authorities and of the modes of review to which they are presently subjected be made an object of ongoing research across jurisdictional lines by appropriate governmental bodies, in order to determine what review structures might be rationalized and how the review process itself might be simplified or made more effective.*

In those cases where review is not made by a departmental authority or internal to an agency, it would be worthwhile to determine whether a small number of appellate tribunals, or even a single tribunal sitting in several divisions, might not be a more easily accessible and rational way of providing review than a number of specialized appellate tribunals. For example, as was mentioned in Chapter Seven, it might well be desirable for all appeals from decisions of benefits agencies, with the possible exception of those operating under the aegis of Veterans Affairs, to be dealt with by a single tribunal rather than by the various specialized tribunals or Federal Court judges sitting as umpires, as is now the case.

Administrative decisions in other than social benefits areas seem somewhat less amenable to this type of unification; however, ongoing research across jurisdictional lines is required to identify other areas that might benefit from rationalized review structures. Such research might be carried out by the Law Reform Commission, the proposed Administrative Council discussed *infra*, or some other body designated by the government.

To give an example of a common law country which has recently undertaken radical reforms in the review of administrative action, Australia created in 1975 a single administrative appeal tribunal comprised of a General Administrative Division, a Medical Appeals Division, a Valuation and Compensation Division, and may eventually include such other divisions as can be prescribed under the *Administrative Appeals Tribunal Act*.[241] It can and does review the exercise of statutory discretionary powers on the merits as well as on the law. Anyone aggrieved by a decision made pursuant to a statutory power scheduled to the Act is entitled to apply to the Tribunal for a "*de novo*" review — i.e., the Act places the Tribunal in the same position as the initial decider to exercise any power which could have been exercised by the initial decider. It is too early in the life of this tribunal to assess its impact, but the Australian Law Reform Commission in its Report Number 10(1978) indicates that the Tribunal is taking a fairly activist role, and is not reluctant to review government policy even at the highest level.

D. Review by a Separate Administrative Court System

An example of a more radical approach to the treatment of administrative law cases is the French system in which there is a set of administrative tribunals totally separate from the regular courts to deal with litigation between the state and individual parties. Since the time of the French Revolution when the old provincial high courts called *Parlements* were frustrating attempts at governmental reform made by the revolutionary national administration, the machinery of justice for public law, overseen by a central government body called the *Conseil d'État*, has been divided from that of private law.[242]

The *Conseil d'État* was created at that time with an administrative litigation branch established to hear public law cases of importance to national public administration. Today it also serves as an appellate body on cases originating before regionalized administrative tribunals. Before 1953 the institutional predecessors of the lower tribunals appeared on government organizational charts as subordinate bodies under the umbrella of general powers of the *Conseil d'État*, but since then they have been linked administratively to central government organs only through the Ministry of the Interior.

It has been in the British tradition to fear interference with primary legal values by the Crown more than intervention by the judiciary. The days of the Jacobites and the Star Chamber are still remembered. Dicey identified administrative law in a negative manner with the French *droit administratif*, a special body of law relating to administrative authorities which is applied through an administrative tribunal system separated from civil courts of justice. Lord Chief Justice Hewart, author of the *New Despotism*,[243] decried the growth in the power of the bureaucratic state and declared that the best way to control the administration is to subject it to the laws administered by the ordinary courts using traditional legal remedies, and not to tribunals of lawyers trained also in public

administration who could apply special remedies of their own in the administrative field. This criticism hearkens strongly to traditional notions of the rule of law. However, several common lawyers versed in administrative law matters, as well as civilian lawyers, have pointed out that the *Conseil d'État* has managed to be at least as effective in protecting the public against arbitrary administration as have the ordinary courts in common law countries.[244]

One apparent result of the combined jurisdiction of common law courts over both the private sector and government administration is the gradual spread of public administrative procedural law principles to cover, arguably inappropriately, the actions of private sector bodies in society to which individuals belong and which they wish to remain separate from state administrative police actions. In a strange sense, both libertarians desiring limited state influence and persons leaning toward increased state activity of professional quality but not of a totalitarian nature might favour a separate administrative court system. However, their motives differ. Libertarians wish to protect intermediate institutions and individuals in society from having their affairs unduly encroached upon by the state. Many persons concerned about the professional quality of state activity but not necessarily in limiting its orbit, believe that the introduction of a separate public law system would promote excellence in government. But there remain those who associate the state with homogeneous societal interests and see at least a partial "public" element in all groups or associations. They might wish to encourage the further spread of common law court review of administrative action from state to other "public" authorities.

The preceding comments may well raise a moot point. To suggest at this time the development of a separate system of Canadian public law would probably be perceived as requiring a radical change in attitudes on the part of government and the legal profession, and perhaps citizens. In any event, the delineation of recommendations in that direction at this time would entail stepping beyond the bounds of administrative law reforms discussed in this paper.

E. Need for Administrative Law Advisory Body

Within the context of the current legal system in Canada, there remains the need to initiate one key institutional reform to federal administrative law which has not yet been prepared in the form of draft legislation. This is the establishment of an advisory body on administrative law and procedures. Such bodies have been created in the United Kingdom, the United States and Australia, countries with economic systems and legal traditions akin to those of Canada. These bodies are called the Council on Tribunals,[245] the Administrative Conference[246] and the Administrative Review Council,[247] respectively. The Statutory Powers Procedure Rules Committee in Ontario, created under the Act of the same name, is of a similar nature.[248] The backgrounds and description of, and the justification for such bodies are treated in some detail in a study paper being prepared on the desirability of establishing a monitoring mechanism or an advisory body on the administrative process.[249]

1. *Legislative Planning and Drafting*

The first effective controls to be devised for an administrative authority come at the stage of initial legislative planning for its establishment. In the Canadian context, this requires the Cabinet or the responsible Minister, assisted by officials who are experts on the machinery of government and administrative law, and by legislative draftsmen, to draft appropriate legislation for eventual introduction to Parliament once the creation of a new authority is adopted as a governmental priority.

Unfortunately, there is no institutional mechanism in Canada at this time having at its disposal the number of persons and expertise required to ensure that new or modified statutory authorities which the government wishes to bring into existence will possess a blend of functions, powers and

procedures fitting well into the overall structure and scheme of administration. Although the Privy Council Office has a handful of officials responsible for overseeing the machinery of government, they cannot hope to do more than monitor or give occasional guidance to new development. The demands made on the time of these officials, their limited resources, and the desirability of keeping Privy Council secretariats small so that the officials therein can interact effectively, while at the same time leaving departments and other governmental bodies to go about their business, makes it virtually impossible for the Privy Council Office to exercise general control.

Lawyers in the Legislative Drafting Section and in Legal Services for the Privy Council are kept so busy preparing or vetting the details of legislation and subordinate statutory instruments, respectively, that they cannot be expected to reflect on how proposed administrative activities might best be fitted into the structure of administration.

One effective step which can be taken to ensure that new statutory authorities are designed to operate well while taking into account the existing machinery of government and administrative traditions is to establish a specialist administrative body to advise the government on what should be contained in draft administrative legislation and statutory instruments arising thereunder, among other things.

In France, this is a role long played by the *Conseil d'État*, which is one of a handful of central consultative bodies on economic, social and other governmental matters advising the government. The practice has also evolved in the United Kingdom of referring all draft legislation affecting the British administrative tribunal system to the Council on Tribunals for study and comment.

2. *Monitoring Administrative Procedures*

Advisory bodies of the three common law countries mentioned above concentrate much of their attention on monitoring the procedures followed by administrative authorities. The

Council on Tribunals is limited in its jurisdiction to a study of the constitution and workings of independent, mostly local, tribunals in a unitary state, while the Australian and American bodies have a mandate to study their respective federal statutory administrative authorities in general.

The Statutory Powers Procedure Rules Committee in Ontario has to maintain under continuous review the practices and procedures of tribunals with a view to their improvement. The Committee also acts as a consultative body in the making of appropriate rules additional to the minimal rules for tribunals specified in the Act, and in the making of rules for the exercise of statutory powers of certain classes of tribunals to which the statutory minimal rules provisions do not apply. In principle, the Committee reports annually to the Minister of Justice and Attorney General, but in fact it has done so formally only once.[250]

3. *Consultations on Appointments to Independent Agencies*

As was mentioned in Chapter Eight, the Home Secretary must take into account recommendations made by the Council on Tribunals before appointing members to administrative tribunals in the United Kingdom. A Canadian federal administrative law advisory body could perform the same function here.

4. *Administrative Council Proposal*

The Law Reform Commission is convinced that an institutional focal point is necessary to develop and maintain sound administrative practices at the federal level in Canada. To that end, we recommend that:

> 9.4 *an Administrative Council should be created to perform the types of activity assigned to similar administrative law consultative bodies in other common law jurisdictions.*

We also recommend that:

> 9.5 *the Administrative Council should have a role to play in the planning and drafting of legislation concerning administrative authorities, monitoring the proceedings of such authorities, and in advising them on procedures and practices they might adopt; as suggested before, it could also be consulted on appointments of members to independent agencies.*

It is conceivable that one piece of legislation could be used both to create an Administrative Council and to provide for guidelines or minimum statutory standards for federal administrative proceedings. This is presently a subject of research at the Commission.

An Administrative Council could be created within the present institutional framework, and might not necessarily require much additional organization. However, it would benefit from advice tendered by a consultative committee composed of persons with experience both inside and outside of government. It could consist of as small a unit as a research secretariat directed by a committee of senior officials drawn from the Privy Council Office, the Department of Justice, and the Law Reform Commission, among other governmental bodies. On the other hand, it could be structured as an independent agency with its own full-time chairman. It could report either directly to Parliament or through a responsible Minister such as the Minister of Justice, or perhaps through the Prime Minister as does the Economic Council.[251] The latter model has the advantage that the proposed Council would not be battling departmental advisors sharing the same responsible Minister regarding which policy directions to follow. Whatever the organizational structure chosen for an Administrative Council, the Commission recommends that:

> 9.6 *a broadly based consultative committee for the Administrative Council should be established, which would include representatives from outside of government who could help to give direction to recommendations on reforms regarding broad problems relating to procedures before administrative authorities.*

Experience gained by administrative law specialists working with the Administrative Conference in the United States and with the Law Reform Commission of Canada also indicates that administrative reform proposals are often most appreciated and effectively implemented when they are made in the context or on the basis of studies of individual administrative authorities. The Commission recommends that:

> 9.7 *the Administrative Council should have the power, at the request or with the permission of the Government, the responsible Minister, or an administrative authority itself, to conduct a study of the authority for the purpose of measuring the quality of its practices and procedures, and making recommendations for their reform.*

To a certain extent, this has been a role played by the Law Reform Commission's individual agency studies to date.

F. Conclusion

To sum up its position on the introduction of institutional reforms in the field of administrative law, the Law Reform Commission thinks it necessary: for an Administrative Council to be established to consult the government on legislation and procedures relating to administrative authorities and appointment of members of independent agencies; for an Office of Ombudsman to be created; for administrative tribunal review mechanisms to be rationalized to the degree presently practicable and inquiry to be made regarding more basic reforms in the whole system of review of administrative action; and for general legislation to be passed dealing with freedom of information, including provision for an Information Commissioner, and consequential changes to be made to the law and government policy on secrecy in government and Crown privilege.

Summary of Recommendations

CHAPTER THREE: The Legislative Framework and the Role of Parliament

The Commission recommends that:

3.1 where independent administrative agencies have analogous purposes, they should be designed along similar lines. In relation to similar types of functions carried out by various agencies, there should be similar sets of powers relating to those functions, drafted in uniform terminology. Agencies with similar types of powers and procedures should also have the same statutory label. (P. 50)

3.2 the Government should consistently follow the practice of preparing in advance a list of legislation to be introduced according to priority in each session of Parliament, and legislative drafters should be engaged in the preliminary preparation of legislation early in the planning process. (P. 51)

3.3 legislation should be drafted in plain language and arranged in a logical and intelligible manner instead of using antiquated conventions and archaic terminology. (P. 51)

3.4 drafters should use model checklists to ensure conformance of draft legislation with basic requirements of form, phraseology and substantive law. (P. 52)

3.5 the same statutory format should be followed, where feasible, in all cases where the same type of legislation is involved. (P. 52)

3.6 comprehensive subject indexing, with references appropriate for lay readers as well as specialists, should be

prepared for the Revised Statutes of Canada and for each new volume of statutes as it appears. Indexing of individual Acts should be continued as part of the general index. (P. 53)

3.7 a summary of legislative provisions should be placed at the beginning of statutes, especially those which are long or complicated. (P. 53)

3.8 the Government should sponsor the publication of the Statutes of Canada Annotated, statutory rules being annotated with explanatory notes to promote comprehension of the law. (P. 53)

3.9 the practice of according powers to an agency by declaring it a "court of record", should be abandoned. More specific drafting terminology should be developed to deal with the various issues of status, powers and procedure, such as problems of contempt, which the present term has been used, in different ways at different times, to cover. (P. 57)

3.10 the practice of granting blanket administrative powers by, for example, adopting by reference the powers given to commissioners under Part I of the *Inquiries Act* should be abandoned. (P. 58)

3.11 more attention should be paid to giving administrative authorities sanctioning powers appropriate to their mandates. (P. 59)

3.12 when an independent agency is established its policy mandate or guidelines should, in principle, be stated clearly in its enabling Act. (P. 62)

3.13 when an agency has through experience appropriately articulated a once vague mandate, it should be inserted into the Act. (P. 63)

3.14 if the Governor in Council, pursuant to the *Public Service Rearrangement and Transfer of Duties Act*, transfers administrative powers or duties from a statutory agency to a department or other agency of government, Parliamentary approval should be required. (P. 63)

3.15 independent agencies should prepare detailed annual reports which should be automatically and permanently referred to the appropriate standing committees of the House of Commons and subjected to close scrutiny there. (P. 63)

3.16 Parliamentary Standing Committees to which annual reports are referred should be strengthened. Each Committee should be allocated its own operational budget, part of which should be used to pay for permanent research staff adequate in size for the committee to scrutinize administration effectively, and, in appropriate cases, conduct additional research on administrative operations. (P. 64)

3.17 the *Statutory Instruments Act* should be amended to require the Clerk of the Privy Council to make available on a regular basis to the Standing Joint Committee on Regulations and Other Statutory Instruments lists and summaries of all statutory instruments to be registered with the Privy Council which are placed on the weekly agenda of the Cabinet Committee responsible for statutory instruments. Such listed instruments as the Joint Committee expressed an interest in examining should then be made available to it; but Committee members should undertake not to make public the contents of instruments exempted from inspection under section 27 of the Act. (P. 69)

3.18 provision should be made in the Standing Orders of the House and the Rules of the Senate for debate on questionable statutory instruments at the request of at least ten members of the particular Chamber within a limited delay period, and for the making of resolutions to refer statutory instruments to the responsible Minister for reconsideration; and

3.19 detailed provisions should be set out regarding the procedures to be followed in the House and Senate to carry out affirmative or negative resolutions regarding statutory instruments. (P. 72)

The Commission recommends that:

4.1 to avoid unnecessary confusion regarding the sources of policy direction for an agency, its enabling Act should contain provisions chosen with a conscious view to the degree to which the agency should be provided with political insulation or Ministerial control at different stages of the administrative process. (P. 74)

4.2 the presumption should operate in structuring the machinery of government, that administrative authorities be established within departmental confines unless there are very good reasons for constituting them as independent agencies. (P. 74)

4.3 agencies performing solely a court-like function should be kept free from governmental interference. (P. 75)

4.4 there should be some direct line of accountability to elected officials for all delegated legislation; where an agency is given power to make its own regulations without government direction or approval, those regulations should be made subject to affirmative or negative resolution by Parliament. (P. 84)

4.5 if there is to be Ministerial control over agency decision-making, it should in principle be done on a general policy level in advance of specific cases. (P. 84)

4.6 the power to issue directions should be used, but sparingly and not as a general political control device, in giving policy directions over well-defined areas of activity to agencies having relatively broad mandates to elaborate and apply policy. (P. 85)

4.7 prior to the issuance of a policy direction to an independent agency, the Government should refer the matter to the agency, which may request public submissions thereon and shall make a public report within ninety days or such longer period as the Government may specify, and further, such direction should be published in the *Canada Gazette* and tabled in the House of Commons. (P. 85)

4.8 in order to provide for the possibility of Parliamentary control over directions, Parliament should retain a power to pass a negative resolution within seven days after a direction is issued. (P. 86)

4.9 the Governor in Council should have the power to issue a "stop order", effectively halting agency proceedings for a period of up to ninety days, in order that an appropriate general direction might be issued for the agency to consider in arriving at a final decision. (P. 86)

4.10 in order that agencies to which directions have been issued might benefit from further clarification of the meaning of directions, they should have the power to refer them back to the issuing authority for interpretation. Such interpretation should then be issued within thirty days. (P. 86)

4.11 an arrangement whereby the Governor in Council is required to consider for approval every decision of a regulatory agency pertaining to a particular field should not be adopted as a model political control device. (P. 87)

4.12 provisions for the final disposition by the Cabinet or a minister of appeals of any agency decisions, except those requesting an equivalent of the exercise of the prerogative of mercy or a decision based on humanitarian grounds, should be abolished. (P. 88)

4.13 departments and agencies should have not only the right but the responsibility to intervene in proceedings of special interest to them before other departments or agencies and, conversely, the responsibility to hear the views of those others which seek to make representations before them. This should occur as much as possible in public proceedings. (P. 90)

4.14 *ex parte* communications to an agency from any governmental authority or other sources making representations pertaining to particular proceedings should be put on the record in the course of those proceedings. (P. 90)

4.15 where the Government decides to establish structures or initiate programs the arrangements for which might fly

in the face of existing economic or social legislation, there should be means for the Government to deal with such matters itself. The least controversial device would, of course, be special legislation. (P. 92)

CHAPTER FIVE: Public Interest Representation and Rule-making

The Commission recommends that:

5.1 independent agencies should experiment with innovative notice techniques in connection with those types of proceedings where it is important to ensure that an agency will obtain a balanced picture of the issues at stake because there is a wide range of constituent interests affected by decisions flowing from the proceedings. (P. 101)

5.2 each agency should have a designated information officer or staff equipped to answer in simple language standard questions posed about the jurisdiction, procedures and policies of the agency. There should also be prompt and adequate responses to inquiries from the public. (P. 104)

5.3 agencies should produce for the public written materials explaining in simple lay terms their organization and jurisdiction, their general rules of procedure, and how the public may obtain information and make submissions or requests. (P. 104)

5.4 agencies should consolidate and make available for public inspection and copying: their decisions and reasons for judgment, including concurring or dissenting opinions; rules of general applicability adopted by the agency; and administrative manuals, instructions or guidelines on the basis of which advice is given or action is taken, except those that must be kept confidential for reasons of effective enforcement policy and the like. (P. 104)

5.5 government funding should continue to be made available for worthwhile public interest intervention activities. (P. 106)

5.6 agencies discharging a substantial policy planning function should commit themselves to utilize such techniques as community animation, public information initiatives and public education programs whenever appropriate to induce effective public participation in such planning. (P. 111)

5.7 in order to strike the best balance in interest representation in the format of agency proceedings, agencies should engage in experimentation with different procedures, forms and techniques allowing such representation. Innovation should be encouraged. (P. 113)

5.8 each agency should eventually develop for itself an appropriate set of rules of procedure taking into account public interest representation. (P. 114)

5.9 statutory authorities should move towards increased rule-making which, as much as possible, should take place in special proceedings designed for the purpose. Rules made pursuant to such proceedings would include regulations and other statutory instruments, directions from the executive branch, formal policy elaborated in policy-making proceedings such as those conducted by the CRTC, and so forth. (P. 115)

5.10 procedures for rule-making should include, at a minimum, a legal requirement that an authority provide public notice identifying draft rules being considered for adoption, allow time for interested persons to comment on them, and take into account any comments made. (P. 115)

5.11 enabling legislation should, as much as possible, expressly authorize rule-making by most agencies, so that the grounds for the exercise of discretionary power will receive maximum exposure. (P. 116)

CHAPTER SIX: Guidelines for Administrative Procedure

The Commission recommends that:

6.1 parties to any proceedings should be given reasonable notice of a hearing by the administrative authority

responsible, and informed of the nature of the proceedings, the time and place of hearing, and the issues to be raised. (P. 122)

6.2 hearings with the full panoply of traditional procedural safeguards, including the right of parties to call and examine witnesses and present their arguments and submissions, the conducting of cross-examination of witnesses and the making of decisions based on the hearings record, should be used by agencies in proceedings involving initial restraints on the liberty of persons, the confiscation of substantial property rights, or the imposition of other significant sanctions. (P. 125)

6.3 in those types of cases where a court-like hearing is not warranted, but some kind of hearing is required for the sake of fairness or accuracy, minimum procedural safeguards should be adopted requiring that appropriate notice of hearings be given and written comments from interested persons be solicited and considered. Supplementary use could be made of written interrogatories, oral submissions and cross-examinations in certain cases or on specific issues, at the discretion of the agency. This kind of hearing would include rule-making proceedings. (P. 130)

6.4 in cases where individual life or liberty is not at stake, parties should be allowed to waive procedural rights so that safeguards otherwise required would not be applicable and case resolution might be expedited. (P. 131)

6.5 agencies should develop official policies concerning the conditions under which informal advice can be given by staff, and procedures under which such advice can be easily referred to a higher level for review. (P. 131)

6.6 each agency should establish procedures whereby it may keep control over its proceedings and the timetable followed therein, and provision should be made for appropriate sanctions against parties who fail to comply with procedural rules. (P. 132)

6.7 the practice of delegating formal authority to individual agency members or hearing officers to hold hearings and

make findings or recommendations for final decisions by an agency should be adopted, when appropriate, in proceedings where problems of time or geographic dispersion of cases are too burdensome for the agency sitting as a collegial body. (P. 133)

6.8 agencies should, in appropriate cases, release and distribute information at their disposal, including research papers by staff members which deal with relevant matters not elsewhere disclosed in documentation available to participants; but agency documents should not attribute to the staff any official position with respect to any issues raised. (P. 136)

6.9 agencies should make official decisions in writing. They should also be required, at least when requested, to give reasons for their decisions. Reasons should be made available, even when no hearings have been held, where decisions are taken directly and adversely affecting persons whose dossiers are the subject of a decision. (P. 138)

6.10 the federal and provincial attorneys-general should designate appropriate officials to study jointly the possibility of incorporating into legal aid plans and federal-provincial cost sharing formulae, an effective mechanism for legal representation of individuals, where appropriate, before federal administrative agencies. (P. 139)

6.11 agency procedures should not be unnecessarily complex or incomprehensible to the lay public. They should not be designed solely for specialized practitioners. (P. 140)

6.12 general legislation should be enacted incorporating minimum administrative procedure safeguards or providing the means for the development of common procedural guidelines. (P. 141)

CHAPTER SEVEN: Administrative Agencies and the Courts

The Commission recommends that:

7.1 the Federal Court of Canada should retain exclusive jurisdiction for judicial review of federal administrative authorities. (P. 145)

7.2 the artificial compartmentalization of various administrative activities through the use of such labels as "quasi-judicial" or "administrative" should be avoided in any future legislation defining the scope of judicial review or regulating administrative procedures. (P. 148)

7.3 the *Federal Court Act* should be amended so that judicial review may be initiated by a single type of application for review, whatever form of relief be desired, thereby doing away with the prerogative writs. (P. 150)

7.4 judicial review, whether for illegality or unfair procedure, should continue to extend to all federal statutory authorities, whether they be Ministers, officials, or administrative bodies. (P. 151)

7.5 the grounds of review and forms of relief should be expressly articulated in legislation, but in an open ended way so as to permit future evolution. (P. 151)

7.6 consideration should be given, as far as possible, to putting the Crown on the same footing as individuals with respect to claims for judicial relief against it. (P.152)

7.7 the members of the Trial Division of the Federal Court should no longer sit as unemployment umpires; this task should be assigned to a specialized administrative tribunal. (P. 156)

7.8 immigration appeals should be transferred out of the Federal Court of Appeal to the Trial Division or a specialized administrative tribunal. (P. 157)

CHAPTER EIGHT: Professional Standards

The Commission recommends that:

8.1 for each agency composed of Governor-in-Council appointees as members, there should be general guidelines in writing setting forth the desired qualities or expertise for an appointee to a given post. (P. 161)

8.2 an Administrative Council, referred to in recommendation 9.4, could advise the Government on appointments of members to agencies; but, even if that were not to be done, existing associations in the private sector could be

asked to comment on a short list of nominees in appropriate circumstances. With respect to appointments to major regulatory agencies in areas such as transport, communications and energy, prior consultation with provincial governments might also be desirable. (P. 162)

8.3 the Government should consider placing public job advertisements asking interested people to file applications for full-time posts as members of agencies. Nominations to the post of chairman or vice-chairman could remain dependent on final determination by the Cabinet. (P. 163)

8.4 greater effort should be made to broaden the perspectives of agencies through the appointment in appropriate cases of persons with varying backgrounds and training who represent interests an agency must take into account in performing its functions. (P. 163)

8.5 the Government should sustain a high level of commitment to placing qualified women in key positions. This goal can frequently be more easily achieved by means of appointment by Order-in-Council than by filling positions through the public service job placement process. Through the appointment of more women to them as members, independent agencies could be in the forefront in giving equal status for equal qualifications. (P. 163)

8.6 the terms of service of agency members respecting such matters as the number of years an appointment will last and security of tenure should be re-examined so as to make the positions attractive to a wide range of persons. (P. 164)

8.7 the chairman of each independent collegial agency should be given statutory power to direct and control the members and staff, unless a particular member or members carry out major functions unrelated to those of the agency as a whole. (P. 169)

8.8 there should be some organized system of training, both introductory and continuing, for agency members and staff in order that agencies may continue to improve professional standards; to assist agencies which are too small to organize their own training programs or mate-

rials economically, or to prepare programs in which various agencies with similar interests desire to participate, a government body responsible for training programs should be asked to undertake a major organizational role. (P. 172)

CHAPTER NINE: New Institutional Controls over Administration

The Commission recommends that:

9.1 general legislation dealing with freedom of information, including provision for an Information Commissioner, should be passed and proclaimed as soon as it is practicable. However, the Government should also make appropriate changes in legislation and practices regarding official secrets and confidentiality, and the status and use of claims to Crown privilege. (P. 176)

9.2 legislation creating a federal Office of Ombudsman, which would incorporate in its list of functions those presently carried out by the Privacy Commissioner and the Correctional Investigator, should be passed as soon as possible. (P. 178)

9.3 the examination of existing discretionary powers held by administrative authorities and of the modes of review to which they are presently subjected should be made an object of ongoing research across jurisdictional lines by appropriate governmental bodies, in order to determine what review structures might be rationalized and how the review process itself might be simplified or made more effective. (P. 178)

9.4 an Administrative Council should be created at the federal level in Canada to perform the types of activity assigned to similar administrative law consultative bodies in other common law jurisdictions. (P. 184)

9.5 the Administrative Council should have a role to play in the planning and drafting of legislation concerning administrative authorities, in monitoring the proceedings of such authorities, and in advising them on procedures and practices they might adopt. As suggested before, it

could also be consulted on appointments of members to independent agencies. (P. 185)

9.6 a broadly based consultative committee for the Administrative Council should be established, which would include representatives from outside of government who could help to give direction to recommendations on reforms regarding broad problems relating to procedures before administrative authorities. (P. 185)

9.7 the Administrative Council should have the power, at the request or with the permission of the Government, the responsible Minister, or an administrative authority itself, to conduct a study of the authority for the purpose of measuring the quality of its practices and procedures, and making recommendations for their reform. (P. 186)

Endnotes

1. A. V. Dicey, *An Introduction to the Study of the Law of the Constitution*. Seventh Edition (1908), at 330.
2. Law Reform Commission of Canada, Working Paper 9, *Expropriation* (1975), and *Report on Expropriation* (1976).
3. Law Reform Commission of Canada, *Report on Evidence* (1975).
4. Law Reform Commission of Canada, Working Paper 17, *Commissions of Inquiry: A New Act* (1977).
5. Law Reform Commission of Canada, Working Paper 18, *Federal Court: Judicial Review* (1977).
6. *Federal Court Act*, S.C. 1970-71-72, c. 1; R.S.C. 1970, 2nd Supp., c. 10.
7. P. Anisman, *A Catalogue of Discretionary Powers in the Revised Statutes of Canada*, 1970. (1975) Law Reform Commission of Canada.
8. I. A. Hunter and I. F. Kelly, *The Immigration Appeal Board*. (1976) Law Reform Commission of Canada.
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20. R. T. Franson, *Access to Information: Independent Administrative Agencies*. (1979) Law Reform Commission of Canada.

21. D. Fox, *Public Participation in Administrative Proceedings*. (to be published) Law Reform Commission of Canada.

22. L. Vandervort, *Political Control of Independent Agencies*. (to be published) Law Reform Commission of Canada.

23. F. Slatter, *Parliament and Administrative Agencies*. (to be published) Law Reform Commission of Canada.

24. J. A. Leadbeater, *Supervision with Independence in the Administrative Process*. (to be published) Law Reform Commission of Canada.

25. D. J. Mullan, *The Federal Court Act: A Study of the Court's Administrative Law Jurisdiction*. (1977) Law Reform Commission of Canada.

26. Federal Court Paper, *supra*, note 5.

27. *Federal Court Act*, S.C. 1970-71-72, c. 1; R.S.C. 1970, 2nd Supp., c. 10.

28. In Working Paper 18, *Federal Court: Judicial Review* (1977), the term "administrative authority" was introduced to replace the more ambiguous term "administrative tribunal" when referring to governmental bodies or persons having or exercising jurisdiction or powers conferred by or under an Act of Parliament, as set forth in section 2 of the *Federal Court Act* under the definition of a "Federal board commission or other tribunal".

29. The definitions of effectiveness, economy and efficiency are borrowed from the *Report of the Auditor General of Canada*, 1978, at 34-35.

30. This chapter draws upon information compiled in J. E. Hodgetts, *The Canadian Public Service*: A Physiology of Government (1867-1970) (1973), and in a research paper by S. Hyson, *Federal Administrative Agencies: Origins and Evolution* (1975), in the files of the Law Reform Commission of Canada.

31. *The British North America Act*, 1867, R.S.C. 1970, App. II, No. 5; 30 & 31 Victoria, c. 3 (U.K.).

32. Report on Evidence *supra*, note 3, at 32-34, and 82-83.

33. R.S.C. 1970, App. II, No. 5; 30 & 31 Victoria, c. 3 (U.K.).

34. *Canadian Bill of Rights*, R.S.C. 1970, App. III; 8-9 Eliz. II, c. 44 (Canada).

35. *Canadian Human Rights Act*, S.C. 1976-77, c. 33.

36. *Official Languages Act*, R.S.C. 1970, c. O-2.

37. For a thumbnail sketch of railway regulatory developments in Canada up to 1903, see Hyson, *supra*, note 30, at 7-12.

38. *Report of the Royal Commission on Railways*. Sessional Paper No. 8a. 2nd Session of the 6th Parliament Canada (1888).

39. The Interstate Commerce Commission of the United States was created under the *Interstate Commerce Act*, Feb. 4, 1887, ch.104, 24 U.S. Stat. 379.

40. The British Government set up a Board of Railway Commissioners in 1846 and abolished it in 1851. A new Railway and Canal Commission was established in 1873 and reconstituted with wider powers in 1888. See R. E. Wraith and P. G. Hutchesson, *Administrative Tribunals*. Allen & Unwin: London (1973), at 25-28.

41. *Reports upon Railway Commissions, Railway Rate Grievances and Regulative Legislation*. Sessional Paper No. 20a. 2nd Session of the 9th Parliament. Canada (1902).

42. *Railway Act*, S.C. 1903, 3 E. VII, c. 58.

43. See the *International Boundary Waters Treaty Act*, R.S.C. 1970, c. I-20 (an Act of 1911 ratifying the Boundary Waters Treaty of 1909 that provided for an International Joint Commission).

44. By the Rivers and Harbors Act of 1902, the United States Congress requested the President of the United States to invite Great Britain to jointly establish an international commission to be composed of three American and three Canadian representatives. This led to the establishment of the International Waterways Commission. See J. G. Castel, *International Laws Chiefly as Interpreted and Applied in Canada* (Toronto: Butterworths, 3rd ed., 1976), at 367-378.

45. *Canada Grain Act*, S.C. 1912, c. 27.

46. *Civil Service Act*, S.C. 1918, c. 12.

47. *Public Service Rearrangement and Transfer of Duties Act*, S.C. 1918, c. 6.

48. *Act to Amend the Public Service Rearrangement and Transfer of Duties Act*, S.C. 1925, c. 23.

49. *Regulations Act*, R.S.C. 1970, c. R-5, repealed by the *Statutory Instruments Act*, S.C. 1970-71-72, c. 38.

50. *Combines and Fair Prices Act*, S.C. 1919, c. 45.

51. Report of the Royal (Rowell-Sirois) Commission on Dominion-Provincial Relations. (3 vol.) 1940. Book I, at 103.

52. J. J. Deutsch, "The Public Service in a Changing Society", (1968) 11 Can. Pub. Adm. 1.

53. *Federal Court Act*, S.C. 1970-71-72, c. 1; R.S.C. 1970, 2nd Supp., c. 10.

54. The (Glassco) Royal Commission on Government Organization, vol. 5, Report (1963), at 75.

55. G. Ganz, "Allocation of Decision-Making Functions (Part II)", (1972) Public Law 299, at 308.

56. For a more extensive list of the reasons for the creation of administrative agencies, see F. Slatter, *Parliament and Administrative Agencies*, *supra*, note 23.

57. *Federal Court Act*, S.C. 1970-71-72, c. 1; R.S.C. 1970, 2nd Supp., c. 10.

58. *Combines Investigation Act*, R.S.C. 1970, c. C-23, as am., S.C. 1974-75-76, c. 76.

59. *Public Service Staff Relations Act*, R.S.C. 1970, c. P-35.

60. *Customs Act*, R.S.C. 1970, c. C-40, s. 47.

61. *Excise Tax Act*, R.S.C. 1970, c. E-13, s. 59.

62. *Anti-dumping Act*, R.S.C. 1970, c. A-15, s. 19.

63. *Income Tax Act*, S.C. 1970-71-72, c. 63, s. 169.

64. *Unemployment Insurance Act*, 1971, S.C. 1970-71-72, c. 48.

65. *Pension Act*, R.S.C. 1970, c. P-7.

66. *Civilian War Pensions and Allowances Act*, R.S.C. 1970, c. C-20.

67. *Canada Pension Plan*, R.S.C. 1970, c. C-5.

68. *Unemployment Insurance Act*, 1971, S.C. 1970-71-72, c. 48.

69. *Quebec Pension Plan Act*, R.S.Q., c. R-9.

70. *War Veterans Allowance Act*, R.S.C. 1970, c. W-5.

71. The term "polycentric", first used by M. Polanyi in *The Logic of Liberty: Reflections and Rejoinders* (1951), at 171, was introduced in a legal context by Lon Fuller in "The Forms and Limits of Adjudication", initially written in 1957 and published posthumously in 92 Harv. L. Rev. 353 (1978), at 394.

72. Catalogue of Discretionary Powers, *supra*, note 7, at 8-18.

73. UIC Study, *supra*, note 11, at 246-247.

74. *Income Tax Act*, S.C. 1970-71-72, c. 63.

75. *Immigration Act*, 1976, S.C. 1976-77, c. 52.

76. *Canada Labour Code*, R.S.C. 1970, c. L-1.

77. *Anti-dumping Act*, R.S.C. 1970, c. A-15.

78. *Statute Revision Act*, 1974, S.C. 1974-75-76, c. 20.

79. Report on Evidence *supra*, note 3, at 9.

80. *National Transportation Act*, R.S.C. 1970, c. N-17.

81. *Canadian Radio-television and Telecommunications Act*, S.C. 1974-75-76, c. 49, s. 14, referring to *Broadcasting Act*, R.S.C. 1970, c. B-11, s. 3.

82. *Railway Act*, R.S.C. 1970, c. R-2.

83. R.S.C. 1970, c. N-17.

84. S.C. 1974-75-76, c. 49, subs. 14(2).

85. Bill C-14, Nuclear Control and Administration Act, First reading, Nov. 24, 1977.

86. *Combines Investigation Act*, R.S.C. 1970, c. C-23.

87. P. Picher, *Courts of Record and Administrative Tribunals* (Draft) June, 1976. Research Paper for the Law Reform Commission of Canada.

88. The Anti-dumping Tribunal is given the powers of a superior court of record under the *Anti-dumping Act*, R.S.C. 1970, c. A-15, s. 27, and the Immigration Appeal Board is given similar powers under the Immigration Act, 1976, S.C. 1976-77, c. 52, s. 65.

89. See, *inter alia*, *Magnasonic Canada Ltd. v. Anti-dumping Tribunal* [1972] F.C. 1239 and *Sarco Canada Ltd. v. Anti-dumping Tribunal* [1979] 1 F.C. 247.

90. *Srivastava v. M.M.I.* [1973] F.C. 138. See also the IAB study, *supra*, note 8, at 36-43.

91. CTC study, *supra*, note 12, at 107-108.

92. *Id.*, at 105-106.

93. *Inquiries Act*, R.S.C. 1970, c. I-13, ss. 4 and 5.

94. S.C. 1976-77, c. 52, s. 113.

95. R.S.C. 1970, c. I-13.

96. *Id.*, ss. 4 and 5.

97. The Law Reform Commission's Police Powers Project is currently engaged in a series of studies on search and seizure operations carried out on behalf of federal administrative authorities. This should provide a substantial amount of information for any future study on investigative powers.

98. NEB study, *supra*, note 13, at 49-50.

99. AECB study, *supra*, note 9, at 44 and 84-85.

100. *Supra*, note 85.

101. *An Act to amend the Canada Labour Code*, S.C. 1977-78, c. 27, s. 43, amended *Labour Code, Canada*, R.S.C. 1970, c. L-1, s. 122, so that the Federal Court of Appeal could only review CLRB decisions under paragraph 28(1)(*a*) of the *Federal Court Act*, R.S.C. 1970, 2nd Supp., c. 10.

102. *Nicholson v. Haldimand — Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311.

103. Royal (Lambert) Commission on Financial Management and Accountability. Final Report (1979), at 370.

104. Parliament and Administrative Agencies study, *supra*, note 23.

105. *Statutory Instruments Act*, S.C. 1970-71-72, c. 38.

106. S.C. 1970-71-72, c. 38, subs. 3(2).

107. The *Canada Gazette* is published in three parts: Part I contains proclamations, appointments and royal assents; Part II contains statutory instruments; Part III contains statutes and amendments to statutes.

108. S.C. 1970-71-72, c. 38, s. 27.

109. *Id.*

110. R.S.C. 1970, c. R-5, repealed, 1970-71-72, c. 38.

111. S.C. 1970-71-72, c. 38, par. 2(1)(*d*).

112. Second Report to Parliament of the Standing Joint Committee of the Senate and the House of Commons on Regulations and Other Statutory Instruments. Second Session of the Thirtieth Parliament, 1976-77, at 47.

113. See the Report, *id.*, at 43-48, for a discussion of the difficulties in defining a statutory instrument under the present Act.

114. S.C. 1970-71-72, c. 38, s. 26, with the exception of regulations made pursuant to paragraph 27(*d*).

115. *Interpretation Act*, R.S.C. 1970, c. I-23.

116. R.S.C. 1970, 2nd Supp., c. 29, subs. 1(3).

117. R.S.C. 1970, c. I-23.

118. *Second Report*, note 112, at 38. The Report refers to the statutory provision in question as Section 28A of the *Interpretation Act*, as added by subsection 28(3) of the *Statutory Instruments Act*, S.C. 1970-71-72, c. 38, but the proper citation is to the *Statutory Instruments, Consequential Amendments Act*, R.S.C. 1970, 2nd Supp., c. 29, subs. 1(3), that replaced provisions of s. 28 of the *Statutory Instruments Act* which had been repealed by *Schedule A* to R.S.C. 1970, 2nd Supp.

119. Canada Parliament. *Third Report of the Special (MacGuigan) Committee on Statutory Instruments*. 1968-69, at 88.

120. *Id.*

121. *Id.*

122. Political Controls Study, *supra*, note 22.

123. CTC Study, *supra*, note 12, at 18, n. 49.

124. *Broadcasting Act*, R.S.C. 1970, c. B-11, s. 27.

125. *Atomic Energy Control Act*, R.S.C. 1970, c. A-19, s. 7.

126. Royal (Lambert) Commission on Financial Management and Accountability, Final Report (1979), at 316.

127. Canada Parliament *Third Report of the Special (MacGuigan) Committee on Statutory Instruments*. 1968-69, at 34-35.

128. R.S.C. 1970, c. A-19.

129. *National Transportation Act*, R.S.C. 1970, c. N-17.

130. Political Controls Study, *Supra*, note 22, discussed in first draft at 50-69.

131. See *Inuit Tapirisat of Canada v. His Excellency the Right Honourable Jules Léger*, [1979] 1 F.C. 213 (T.D.), rev'd, 1 F.C. 710 (C.A.).

132. Political Controls study, *supra*, note 22, First Draft at 219. The letter was submitted as evidence at the Telesat hearing by the Consumers' Association of Canada, whose counsel had found it on a CRTC file.

133. NEB study, *supra*, note 13, at 79-98.

134. Political Controls study, *supra*, note 22, First Draft at 221-222.

135. *Id.*, First Draft, at 209-215.

136. *Northern Pipeline Act*, S.C. 1977-78, c. 20.

137. Interview with NEB legal counsel.

138. Public Participation study, *supra*, note 21, (Draft) Introduction.

139. NEB study, *supra*, note 13, at 42.

140. New CRTC Telecommunications Rules of Procedure, Telecom Orders, CRTC 79-297, went into effect on July 20, 1979.

141. AECB study, *supra*, note 9, at 66-67.

142. Access to Information study, *supra*, note 20.

143. See the *Annual Report* 1978-79, Regulated Industries Program, Consumers' Association of Canada, at 1-5 and 70.

144. The CTC held hearings on the question of awarding costs to intervenors from April 2 to 4, 1975. Commissioner Gray wrote a report to his colleagues, submitted on August 19, 1975, that concluded that costs could not be awarded under existing circumstances.

145. CRTC Press Release, May 23, 1978, at 3. Draft CRTC Telecommunications Rules of Procedure, May, 1978, subs. 52(1).

146. Discussed further in the Public Participation study, *supra*, note 21, (Draft) at 84-88.

147. *Id.*, at 175-176.

148. R.S.C. 1970, c. N-17.

149. *Combines Investigation Act*, R.S.C. 1970, c. C-23, s. 27.1, as added by S.C. 1974-75-76, c. 76.

150. Bill C-13, An Act to Amend the Combines Investigation Act, First Reading, Nov. 18, 1977. See, in particular, s. 19.

151. Discussed further in the Public Participation study, *supra*, note 21, (Draft) at 123-135.

152. A more detailed definition of what administrative procedure involves is provided in the UIC study, *supra,* note 11, at 3-4, and in the PAB study, *supra,* note 15, at 4-6.

153. See the case of *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, for the first application of the doctrine of fairness by the Supreme Court of Canada. For a discussion of the background of the doctrine, see D. J. Mullan, *Fairness: The New Natural Justice?* (1975) 125 U.T.L.J. 281.

154. S.C. 1970-71-72, c. 48.

155. See the Anti-dumping Tribunal study, *supra,* note 16, at 17-19, and the Immigration Appeal Board study, *supra*, note 8 at 40-43.

156. The term "secret law" was first used by Professor K. C. Davis in 1964 in Testimony before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, 88th Cong., 2d Sess., on S. 1663, at page 273. See K. C. Davis, *Administrative Law Treatise* (2d ed., 1978), Vol. I, at 364.

157. CLRB study, *supra*, note 17, final draft at 83.

158. See the *Access to Information* study, *supra*, note 20, at 34-36.

159. *Id.*, at 50.

160. *Id.*

161. NPB study, *supra*, note 10, at 90.

162. CTC study, *supra*, note 12, at 46.

163. Public Participation study, *supra*, note 21, (Draft) at 39.

164. CTC study, *supra*, note 12, at 52-55.

165. *Id.*, at 55-57.

166. Three examples of agency enabling Acts delegating the power to conduct agency hearings to single members of panels of members are the *Broadcasting Act*, R.S.C. 1970, c. B-11, subs. 19(4), the *National Energy Board Act*, R.S.C. 1970, c. N-6, s. 13-14, and the *National Transportation Act*, R.S.C. 1970, c. N-17, ss. 17-20.

167. CTC study, *supra*, note 12, at 47.

168. *Immigration Appeal Board Act*, R.S.C. 1970, c. I-3, subs. 10(1). This Act was repealed by the *Immigration Act*, 1976, S.C. 1976-77, c. 52, and no provision similar to the old section 10 was made.

169. CRTC study, *supra*, note 14, (Draft) at 262-266.

170. R.S.C. 1970, c. N-17.

171. CTC study, *supra*, note 12, at 50.

172. *Id.*, at 87-97.

173. *Id.*, at 71-75.

174. *Tariff Board Act*, R.S.C. 1970, c. T-1, subs. 5(10).

175. *Anti-dumping Act*, R.S.C. 1970, c. A-15, subs. 29(3).

176. CTC study, *supra*, note 12, at 62-64.

177. ADT study, *supra*, note 16, at 32 and 49-50.

178. *Statutory Powers Procedure Act*, S.O. 1971, c. 47.

179. *The Administrative Procedures Act*, R.S.A. 1970, c. 2.

180. The federal *Administrative Procedure Act*, June 11, 1946, ch. 324, 60 Stat. 237, served as a model for later state legislation.

181. *Tribunals and Inquiries Act, 1971*, 19-20 Eliz. II, c. 62(U.K.)

182. *Statutory Powers Procedure Act*, S.O. 1971, c. 47.

183. Federal administrative procedure legislation in the United States has been codified and appears in the United States Code in 5 U.S.C. §§ 551 et seq., 701 et seq., 3105, 3344 and 7521 (1976).

184. Federal Court paper, *supra*, note 5, at 11-12.

185. [1979] 1 S.C.R. 311, at 325.

186. Federal Court paper, *supra*, note 5, at 35-37, 42.

187. R.S.C. 1970, 2nd Supp., c. 10, s. 28.

188. R.S.C. 1970, c. A-15.

189. [1979] 1 S.C.R. 311.

190. Now codified in 5 U.S.C. §§ 551 et seq., 701 et seq., 3105, 3344 and 7521 (1976).

191. *Act to amend the Canada Labour Code*, S.C. 1977-78, c. 27, s. 43.

192. R.S.C. 1970, 2nd Supp., c. 10, par. 28(1)(*a*).

193. Federal Court paper, *supra*, note 5, at 39,42.

194. R.S.C. 1970, 2nd Supp., c. 10.

195. Federal Court paper, *supra*, note 5, at 27.

196. R.S.C. 1970, 2nd Supp., c. 10.

197. Federal Court paper, *supra*, note 5.

198. UIC study, *supra*, note 11, at 301-309. This suggestion is also adopted in the PAB study, *supra*, note 15, at 302-304.

199. Federal Court paper, *supra*, note 5, at 17-18.

200. Federal Court paper, *supra*, note 5, at 17.

201. The subsequent passage in the text is based largely on remarks made by Gordon S. Smith in a panel discussion on Federal senior appoint-

ments to administrative agencies. *Speakers' Remarks*. Seminar for Members of Federal Administrative Tribunals (April, 1978), at 165-179.

202. *Tribunals and Inquiries Act*, 1971, 19-20 Eliz. II, c. 62, s. 5(U.K.).

203. See the research paper prepared for the Law Reform Commission of Canada by Caroline Andrew, Réjean Pelletier and Marthe Blouin, entitled *Composition of Federal Administrative Agencies*, March, 1976.

204. *Id.*, at 14.

205. The subsequent passage in the text is based largely on remarks made by Ian Dewar in a panel discussion on the appointment and evaluation of members of administrative agencies. 2nd Seminar for Members of Federal Administrative Tribunals (March, 1979). See also the comments by A. O. Solomon at the First seminar, *Speakers' Remarks*, *supra*, note 201, at 45-48.

206. S.C. 1976-77, c. 33, pt. IV, ss. 49-62.

207. AECB study, *supra*, note 9, at 34-37, 42.

208. Bill C-14, *Nuclear Control and Administration Act*, First reading, Nov. 24, 1977.

209. See *In re National Energy Board Act* [1976] 1 F.C. 20, and the same case on appeal, *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369.

210. Public Servants Conflict of Interest Guidelines, made on December 18, 1973, SI/74-2.

211. Two examples of agency enabling Acts prohibiting individuals from maintaining certain business interests during their terms as members of agencies are the *National Energy Board Act*, R.S.C. 1970, c. N-6, subs. 3(5), and the *National Transportation Act*, R.S.C. 1970, c. N-17, s. 9.

212. Seminar for members of Federal Administrative Tribunals (April 5-7, 1978), sponsored by the Law Reform Commission of Canada, the Privy Council Office, and the Public Service Commission.

213. Seminar for Members of Federal Administrative Tribunals (March 20-22, 1979), Public Service Commission, in collaboration with the Law Reform Commission of Canada and the Privy Council Office.

214. M. Ruhlen, *Manual for Administrative Law Judges* (1974), prepared for the Administrative Conference of the United States.

215. The subsequent passage in the text is based on remarks made by A. O. Solomon, Chairman of the Canadian Pension Commission. *Speakers' Remarks*, *supra*, note 201, at 36-45.

216. Glassco Commission Report, vol.5, *supra*, note 54, at 75.

217. Secretary of State. *Legislation on Public Access to Government Documents*. June, 1977.

218. The Ontario Royal Commission on Freedom of Information and Individual Privacy, established in March, 1977, is publishing a series of background research papers prepared for it.

219. Nova Scotia. *Freedom of Information Act,* S.N.S. 1977, c. 10. *New Brunswick Right to Information Act,* A.N.B. 1978, c. R-10.3.

220. *Freedom of Information in Canada: A Model Bill* (CBA, 1979).

221. *Ibid.*, ss. 11-15.

222. *Ibid.*, ss. 16-19.

223. Access to Information study, *supra*, note 20, at 65.

224. T. Murray Rankin, *Freedom of Information in Canada: Will the Doors Stay Shut?* (CBA, 1977).

225. *Official Secrets Act,* R.S.C. 1970, c. O-3.

226. R.S.C. 1970, 2nd Supp., c. 10, s. 41.

227. *Oath or Affirmation of Office and Secrecy*, in the *Public Service Employment Act*, R.S.C. 1970, c. P-32, sched. III.

228. The classification of documents for security purposes was discussed in D. F. Wall, *The Provision of Government Information*, (P.C.O., 1974), printed as an Appendix in: Parliament. First Session, Thirtieth Parliament, 1974-75, Standing Joint Committee on Regulations and other Statutory Instruments, Minutes of Proceedings and Evidence, Issue No. 32, pp. 30-71 (Queen's Printer, 1975).

229. Cabinet Directive No. 45, "Notices of Motion for the Production of Papers", tabled in the House of Commons on March 15, 1973.

230. Cabinet Directive No. 46, "Transfer of Public Records to the Public Archives and Access to Public Records held by the Public Archives and by Departments". June, 1973.

231. Definition for the office of ombudsman, as adopted by the International Bar Association at its meeting in Vancouver, August, 1974.

232. The *Parliamentary Commissioner (Ombudsman) Act* was passed by the New Zealand Parliament on September 7, 1962.

233. Alberta. *Ombudsman Act,* R.S.A. 1970, c. 268. British Columbia. *Ombudsman Act*, S.B.C. 1977, c. 58. Manitoba. *Ombudsman Act*, R.S.M. 1970, c. O-45. New Brunswick. *Ombudsman Act*, R.S.N.B. 1973, c. O-5. Newfoundland. *The Parliamentary Commissioner (Ombudsman) Act*, R.S.N. 1970, c. 285. Nova Scotia. *Ombudsman Act*, S.N.S. 1970-71, c. 3. Ontario. *Ombudsman Act*, S.O. 1975, c. 42. Quebec. *Public Protector Act*, R.S.Q., c. P. 32. Saskatchewan. *Ombudsman Act,* S.S. 1972, c. 87.

234. S.C. 1976-77, c. 33.

235. *Id.*, pt. III, ss. 31-48.

236. *Id.*, IV, ss. 49-62.

237. The post of Correctional Investigator was created on June 5, 1973, by Order-in-Council P.C. 1973-1431, and its occupant serves as a Commissioner under the *Inquiries Act*, R.S.C. 1970, c. 1-13.

238. Bill C-43, Ombudsman Act. First reading, April 5, 1978, was prepared following the publication in July, 1977 of a government white paper favouring the establishment of a Canadian Federal Ombudsman.

239. *Ombudsman Act 1976*, Comm. Stats. (Australia), No. 181 of 1976.

240. *Parliamentary Commissioner Act* 1967, 15-16 Eliz. II, c. 13(U.K.).

241. *Administrative Appeals Tribunal Act 1975*, Comm. Stats. (Australia), No. 91 of 1975.

242. Numerous texts are available in French and English on the Conseil d'État. Among them are the following: Brown, L. Neville and Garner, J. F., *French Administrative Law* (2nd ed.), 1973; Debbasch C., *Institutions et droit administratifs*, P.U.F., 1978; Lefas, *et al.*, *Jurisprudence du Conseil d'État et juridictions administratives,* (16 vols.), 1976; and Mestre, A., *Le Conseil d'État, protecteur des prérogatives de l'Administration*, 1974.

243. Lord Hewart (Then Lord Chief Justice), *The New Despotism* (1929).

244. One of the most eloquent supporters of the French public law system in the common law camp has been Professor J. D. B. Mitchell. See, *inter alia*, the following articles by Mitchell: "Controlling the Administration: the Conseil d'État — an effective Solution." 61 L. Soc. Gaz. 719 (1964); "Causes and Effects of the Absence of a System of Public Law in the United Kingdom." (1965) Publ. L. 95, and "State and Public Law in the United Kingdom." 15 I.C.L.Q. 133 (1966).

245. The Council on Tribunals was created under the *Tribunals and Inquiries Act*, 1958, 6-7 Eliz. II, c. 66, s. 1 (U.K.).

246. The permanent Administrative Conference of the United States, which had two temporary predecessors, was created under the Administrative Conference Act, Aug. 30, 1964, Pub. L. 88-499, 78 Stat. 615, and is presently codified under 5 U.S.C. 571-576 (1976).

247. The Administrative Review Council was created under the Administrative Appeals Tribunal Act 1975, Comm. Stats. (Australia). No. 91 of 1975.

248. The Statutory Powers Procedure Rules Committee was established pursuant to the *Statutory Powers Procedure Act*, S.O. 1971, c. 47, pt. II, ss. 26-34.

249. Supervision with Independence study, *supra*, note 24.

250. *First Annual Report of the Statutory Powers Procedure Rules Committee*, May, 1976.

251. The last Liberal government designated the Prime Minister as the Minister responsible for receiving reports from the Economic Council of Canada and laying them before Parliament. *Economic Council of Canada Act*, R.S.C. 1970, c. E-1, s. 21.